No. 85-238

Supreme Court, U.S.
FILED
AUG 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

MICHAEL A. JOHANNS,
Petitioner,

VS.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI to the UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether conviction of an unmarried military officer under Article 133 of the Uniform Code of Military Justice for engaging in private, consensual sexual intercourse with a married person violates the Fifth Amendment to the United States Constitution.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MICHAEL JOHANNS,
PETITIONER,

vs.

UNITED STATES
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioner MICHAEL JOHANNS respectfully prays that a writ of certiorari issue to review a part of the decision of the United States Court of Military Appeals entered in the above-entitled action on June 10, 1985.

OPINIONS BELOW

On July 2, 1982, petitioner was found guilty by general court-martial of four specifications of conduct unbecoming an officer and gentleman in violation of Article 133 of the Uniform Code of Military Justice and one specification of conduct prejudicial to good order and discipline or of a nature to discredit the armed forces in violation of Article 134 of the Uniform Code of Military Justice. He was sentenced to dismissal from the service. The findings of guilty and the sentence were approved by the convening authority.

On October 26, 1983, the United States Air Force Court of Military Review

set aside three of the four findings of guilt under Article 133 of the Uniform Code of Military Justice and ordered a rehearing on sentence on the remaining findings. The government's motion for reconsideration was denied.

On December 16, 1983, the Judge Advocate General of the Air Force certified for review by the United States Court of Military Appeals the issue of whether the Court of Military Review was correct in reversing the conviction of petitioner as to the three specifications of violation of Article 133 or Article 134 of the Uniform Code of Military Justice.

On July 6, 1984, the United States Court of Military Appeals granted petitioners' cross-petition for review on the issue of whether Specification 1 of Charge I (violation of Article 133) and

Charge II (violation of Article 134) were multiplicious. It denied petitioners' cross-petition for review on the issue of whether the Court of Military Review was correct in sustaining the conviction of petitioner as to Specification 1 of Charge I.

On June 10, 1985, the United States Court of Military Appeals dismissed Charge II and its specification on the grounds of multiplicity and affirmed the remainder of the decision of the United States Court of Military Review.

The orders and decisions referred to above are attached as Exhibits A, B, C & D.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §§ 1259(2) and (3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article 133 of the Uniform Code of Military Justice

North Dakota Century Code Section 12.1-20-09 (1975)

Fifth Amendment to the United States Constitution

STATEMENT OF CASE

Captain Michael Johanns, a single man, was convicted of violating Articles 133 and 134 of the Uniform Code of Military Justice by engaging in an act of private consensual sexual intercourse with Sergeant Donna Robbins, a married woman, on October 5, 1981. The United States Court of Military Appeals dismissed the finding of guilty under Article 134 on the grounds of multiplicity, leaving only the

Article 133 conviction at issue. 1/

On October 5, 1981, Captain Johanns, a twenty-eight year old missile combat crew commander with a superlative performance record, went to the Noncommissioned Officers' Club at Minot Air Force Base with a group of friends. (R.T. 105) Since the Officers Club was closed during that period, officers were welcome to socialize at the Noncommissioned Officers' Club. (R. 111). During the evening Captain Johanns

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1/ Specification 1: In that CAPTAIN MICHAEL A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did, at Minot Air Force Base, North Dakota, on or about 5 October 1981, wrongfully, dishonorably, and disgracefully have sexual intercourse with Donna R., Sergeant, United States Air Force, the said Sergeant Donna R. being, at that time, the lawful wife of an active duty enlisted member of the United States Air Force, contrary to the customs and traditions of the armed forces of the United States.

was introduced to Sergeant Robbins, an enlisted person assigned to another unit, and invited her to his trailer. Later that night the two of them engaged in a private, consensual act of sexual intercourse in Captain Johanns' trailer. (R.T. 106) On that date Sergeant Robbins' husband was TDY to Guam for two months. (R.T. 105)

Sergeant Robbins testified that her relationship with Captain Johanns was entirely voluntary and did not compromise his standing in her eyes or in any manner discredit or disgrace him. The brief encounter was terminated before Sergeant Robbins' husband returned home and he was unaware of its occurrence until Sergeant Robbins was compelled to testify at the court-martial hearing. She told no one that she had engaged in sexual intercourse with Captain Johanns. (R.T. 109)

Sergeant Robbins further testified that she was no longer married and that her temporary relationship with Captain Johanns was unrelated to her divorce. (R.T. 112)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE UNITED STATES COURT OF MILITARY APPEALS INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND WHICH CONFLICTS WITH DECISIONS OF OTHER FEDERAL APPELLATE COURTS

Article 133 of the Uniform Code of Military Justice, 10 U.S.C. § 933, states:

> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a

gentleman shall be punished as a court-martial may direct.

There is not a single reported case in which an unmarried military officer has been convicted of a violation of Article 133 of the Uniform Code of Military Justice for engaging in a private consensual act of sexual intercourse.

As the government itself explained in United States v. Melville, 8 U.S.C.M.A. 597, 601, 25 C.M.R. 101 (1958), the most recent adultery case cited by the Court of Military Review in this case, "the marriage of the offending party is the element that distinguishes the offense from a mere disorder."

Adultery is not a crime or an offense under the Uniform Code of Military Justice. Moreover, the sole provision for punishment of adultery in the Manual for

Courts-Martial, 1969 Rev. Ed., applies exclusively when such conduct is proscribed by state law. Paragraph 213c of the Manual for Courts-Martial, 1969 Rev. Ed., states:

> Acts in violation of local civil law may be punished if they are of a nature to bring discredit upon the armed forces. Included within the conduct which may be found to be within the proscription of this clause are adultery, bigamy, negligent homicide, fleeing the scene of an accident, indecent acts, and dishonorable failure to pay debts.

Captain Johanns did not violate the "local civil law", however, since the law of North Dakota provides that only a "married person is guilty of a class A misdemeanor if he or she engages in a

sexual act with another person." North Dakota Century Code Section 12.1-20-09 (1975). (emphasis mine)

The Court of Military Review affirmed Captain Johanns' conviction on the ground that adultery "although seldom prosecuted, is a viable offense subject to trial by court-martial and that "it is military law which defines the parameters of the offense of adultery, not state law." (Slip Opinion at 4) What the Court failed to recognize, however, was that adultery had only been prosecuted by the military when the accused himself was married.

The military law definitions of Article 133 demonstrate why the finding of guilty in petitioner's case is unprecedented. It is well-established that if an officer's conduct charged under Article 133 does not constitute a crime, it must "offend so seriously against law,

justice, morality or decorum as to expose or disgrace socially or as a man, the offender, and at the same time must be of such a nature or committed under circumstances as to bring dishonor or disrepute upon the military profession which he represents." Winthrop, Military Law and Precedents, 711-712 (2d Ed., 1920 reprint). See also United States v. Jefferson, 14 M.J. 806 (1982).

Winthrop further declared that the "military community cannot expect, nor ought it to be expected of them, to preserve a higher tone of moral conduct than what is sustained by the higher orders of society." Winthrop, Military Law and Precedents, (2d ed. 1920 reprint), ftn. 14, p. 711.

The modern version of this rule is found in Paragraph 212 of the Manual for Courts-Martial, 1969 Rev. Ed., which

states explicitly that "(n)ot everyone is or can be expected to meet ideal moral standards."

The most authoritative studies of sexual activity in the United States reported that even in the early 1950's one-half of married men and one-fourth of married women committed adultery sometime in their married lives. Alfred Kinsey, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (Philadelphia 1953) p. 416, and Alfred Kinsey, SEXUAL BEHAVIOR IN THE HUMAN MALE (Philadelphia 1949), p. 585. Undoubtedly the statistics are considerably higher today.

During petitioner's court-martial trial Colonel Lipscomb confirmed the widespread acceptance of adultery at Minot Air Force Base:

> The morals of the Air Force are no different than the majority of

> their counterparts in civilian life. I believe statistics will demonstrate that at least 50% of the males in the Air Force have experienced extra-marital relationships. I can name names of high ranking officers who are well known to be involved in such activity and it is simply winked at. (Appellate Exhibit VII)

Despite the fact that such activity was occurring with regularity, Major William Sherman, Staff Judge Advocate at Minot Air Force Base, testified that previous to this case there had been no prosecutions for adultery. (R.22)

Hence, it is questionable whether even an act of sexual intercourse by a married officer with a woman not his wife would meet the definition of an Article

133 violation in this day and age. In the absence of aggravating circumstances, such a private, consensual act by a single man cannot by any stretch of the imagination "offend so seriously against law, justice, morality or decorum as to expose or disgrace socially or as a man, the offender, and at the same time ... bring dishonor or disrepute upon the military profession..."

Without military law precedent for petitioner's conviction, the only possible basis for the finding of guilty was some non-military federal law. The only context in which the question of what constitutes adultery under federal law arises is in the naturalization area. A person may not become a naturalized citizen unless he or she is of "good moral character." 8 U.S.C. § 1101(f) provides that no person who has "committed

adultery" shall be considered to be of such moral character.

The federal courts have wrestled with the question of how to define "adultery" in this national context. Some courts, most notably the Court of Appeals for the Third Circuit, have determined that adultery should be defined by incorporating the law of the state in which the alien resides into the federal law. Brea-Garcia v. Immigration Service, 531 F. 2d 693 (3rd Cir. 1976).

Other courts such as the Court of Appeals for the District of Columbia and the Ninth Circuit have adopted a uniform definition of adultery. According to this "national" standard, extra-martial intercourse is defined as "adultery" only if it tends to destroy an existing marriage and threatens public morality (for example, it is "open and notorious

cohabitation"). See Moon Ho Kim v. U.S. Immigration and Naturalization Service, 514 F. 2d 179 (D.C. Cir. 1975); Wadman v. Immigration and Naturalization Service, 329 F. 2d 812 (1964); Petition for Naturalization of Richard Schroers, 336 F. Supp. 1348 (S.D. N.Y. 1971); In re Edgar, 253 F. Supp. 951 (E.D. Mich. 1966); Comment, Immigration Law-National Standard, Incorporation of State Law or Hybrid Test-State Definition of Adultery Utilized for Determining Good Moral Character, 51 N.Y.U.L. REV. 1021 (1976).

Under any of the above tests Captain Johanns could not have been found guilty. Under North Dakota law he committed no offense. His conduct did not destroy or even jeopardize any marriage and the relationship was neither open nor notorious, but entirely private.

Since there was no precedent for the Article 133 conviction of a single man for engaging in a private, consensual act of sexual intercourse, since the military definition of Article 133 could not encompass petitioner's conduct, and since petitioner did not violate North Dakota law or commit adultery as defined by any other federal law, he lacked the requisite constitutional notice that his action would be considered felonious.

The Due Process Clause of the Fifth Amendment to the United States Constitution requires that statutes be drafted with sufficient clarity to provide "notice" of what activity is deemed to be prohibited. Connally v. General Construction Company, 269 U.S. 385, 392, 46 S. Ct., 70 L.Ed., 126, 128 (1927);Grayned v. Rockford, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed. 222 (1972).

Because the military is allowed greater latitude in the drafting of its rules than would be constitutional in the civilian forum, "the proper standard of review for a vagueness challenge to the articles of the (Uniform Code of Military Justice) is the standard which applies to criminal statutes regulating economic affairs." Parker v. Levy, 417 U.S. 733, 756-67, 94 S. Ct. 2547, 41 L.Ed. (1974). The Court defined that standard as follows:

> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed . . . In determining the sufficiency of the notice a

> statute must of necessity be examined in the light of the conduct with which a defendant is charged. Id. at 757.

See Comment, Free Speech in the Military, 53 N.Y. UNIV. L. REV. 1102, 1109 (Nov. 1978).

The record clearly shows that petitioner "could not reasonably understand that his conduct would be considered unbecoming an officer and a gentleman" under Article 133 of the Uniform Code of Military Justice.

CONCLUSION

For the foregoing reasons petitioner respectfully prays that this petition for

a writ of certiorari be granted.

Dated, Fresno, California.

July 26, 1985.

Respectfully submitted,

FRAMPTON, KARSHMER & KESSELMAN
Mary Louise Frampton

Major Conrad C. Baldwin, Jr.
Associate Appellate Defense
Counsel
United States Air Force

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MICHAEL A. JOHANNS

APPENDIX

EXHIBIT "A"

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v

Captain MICHAEL A. JOHANNS, 001-46-5650FR
UNITED STATES FIR FORCE

ACM 23699

26 OCT 1983

Sentence adjudged 2 July 1982 by GCM convened at Minot Air Force Base, North Dakota.
Military Judge: Michael C. Callinan.

Approved sentence: Dismissal.

Appellate Counsel for the Accused: Ms. Mary Louise Frampton, Fresno, California, Colonel George R. Stevens and Captain Kathleen G. O'Reilly. Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Major Michael J. Hoover and Captain Brenda J. Hollis.

Before
HODGSON, FORAY, HEMINGWAY, KASTL,
CANELLOS, RAICHLE, MILLER and
SNYDER

Appellate Military Judges, En Banc

DECISION

CANELLOS, Judge:

The accused was convicted, contrary to his pleas, of adultery and of four specifications of conduct unbecoming an officer and a gentleman by having sexual relations with three female enlisted members (one of them married), and by sharing a bed with the married woman while she was intoxicated. 1/ The "conduct unbecoming" specifications are couched in terms that the accused did "dishonorably and disgracefully fraternize and associate on terms of military equality with enlisted members of the United States Air Force." (emphasis added).

1/ The charges upon which the accused was arraigned were:

Charge I: Violation of the Uniform Code of Military Justice, Article 133.

The approved sentence extends to dismissal from the service.

On appeal, the accused claims that

(1/ cont.)

Specification 1: In that CAPTAIN MICHAEL A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did, at Minot Air Force Base, North Dakota, on or about 5 October 1981, wrongfully, dishonorably, and disgracefully have sexual intercourse with Donna R., Sergeant, United States Air Force, the said Sergeant Donna R. being, at that time, the lawful wife of an active duty enlisted member of the United States Air Force, contrary to the customs and traditions of the armed forces of the United States.

Specification 2: In that CAPTAIN MICHAEL A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did, at Minot Air Force Base, North Dakota, on or about 8 October 1981, wrongfully, dishonorably, and disgracefully fraternize and associate on terms of military equality with enlisted members of the United States Air Force, to wit: Sergeant Donna R., by going into the military quarters of the said Sergeant Donna R. at Minot Air Force Base, North Dakota and sharing the same bed with the said Sergeant Donna R. while the said Sergeant Donna R. was the lawful wife of an enlisted member of the United States Air Force, contrary to the customs and traditions of the armed

(1) the court lacked jurisdiction over

1/ cont.)

forces of the United States.

Specification 3: In that CAPTAIN MICHAEL A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did, at Minot, North Dakota, on three or four separate occasions during September, 1981, wrongfully, dishonorably, and disgracefully fraternize and associate on terms of military equality with Staff Sergeant, then Sergeant, Sheryl K., a female active duty enlisted member of the United States Air Force, by engaging in acts of sexual intercourse with the said Staff Sergeant, then Sergeant, Sheryl K., contrary to the customs and traditions of the armed forces of the United States.

Specification 4: In that CAPTAIN MICHAEL A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did, at Minot Air Force Base, North Dakota, on two or three occasions, during November, 1981, wrongfully, dishonorably, and disgracefully fraternize and associate on terms of military equality with Senior Airman Michelle P., then known as Senior Airman Michelle S., a female active duty enlisted member of the United States Air Force, by engaging in acts of sexual intercourse with the said Senior Airman Michelle P., then known as Senior Airman Michelle S., contrary to the customs and traditions of the armed forces of the United States.

the adultery, charged as a violation of Article 134, U.C.M.J.2/, since he did not violate North Dakota law and his conduct therefore did not discredit the armed

1/ cont.)

Charge II: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that CAPTAIN MICHAEL A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did at Minot Air Force Base, North Dakota, on or about 5 October 1981, wrongfully have sexual intercourse with Donna R., a married woman, not his wife.

2/ Art. 134. General article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

forces, (2) Article 133, U.C.M.J. 3/, is void for vagueness as it applies to fraternization, (3) he was tried on the basis of selective prosecution, and (4) the ban on fraternization abridges his right to freedom of association.

The facts are not in dispute. The accused was a single, 28 year old missile combat crew commander who had been stationed at Minot Air Force Base, North Dakota, since completion of training in 1978. The Officers' Open Mess at Minot was being redecorated; as a result, officers had been authorized to utilize the facilities of the Noncommissioned Officers' Open Mess. The accused availed

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3/ Art. 133. Conduct unbecoming an officer and a gentleman

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman

himself of the opportunity and socialized at the NCO Club. There he met Sgt. R. (who was married), SrA P. and SSgt K. He dated each and ultimately had sexual relations with them all. On one occasion, the accused and Sgt R. went on a date downtown, and thereafter returned to her house on base. Sgt. R. was intoxicated and therefore remembers nothing other than the next morning the accused was asleep next to her in her bed.

All this interaction was completely consensual, private, nondeviate, and sometimes instigated by the women involved. The accused was neither the commander nor supervisor of any of these

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3/ cont.)

shall be punished as a court-martial may direct.

enlisted members, and their respective relationships were not publicized.4/ In the opinion of the enlisted women, the accused's activities were neither dishonorable nor service discrediting. The charges resulted from these apparently private, voluntary liaisons.

I

We affirm the conviction of the offense of adultery. Adultery, although seldom prosecuted, is a viable offense subject to trial by court-martial. See generally United States v. Butler, 5 C.M.R. 213 (A.B.R. 1952); United States v. Neville, 7 C.M.R. 180 (A.B.R. 1952).

The accused claims that under the law of North Dakota he did not commit

4/ It was stipulated at trial that the allegations were brought to the attention of the accused's commander by a member of his squadron on the basis of inferences he drew from conversations with the accused.

adultery; however, it is the military law which defines the parameters of the offense of adultery, not state law. United States v. Panchisin, 30 C.M.R. 921 (A.F.B.R.), pet. denied, 31 C.M.R. 314 (1961). It is not required to show that the accused was married; rather, it is sufficient to show that either of the participants was married to a third party. United States v. Melville, 8 U.S.C.M.A. 597, 25 C.M.R. 101 (1958); United States v. Hedgecock, 30 C.M.R. 624 (N.B.R. 1960).

Accordingly, we are convinced that the accused is guilty of the adultery as charged. The evidence clearly establishes that the accused had sexual relations with a woman, not his wife. The woman was an enlisted member of the Untied States Air Force, married to a noncommissioned officer on the same

base. An officer having sexual relations with the wife of an enlisted memberclearly acts in a manner prejudicial to good order and discipline under Article 134, U.C.M.J.5/

Having determined that the accused's conduct amounted to actionable adultery, we further find, on these facts, that he was culpable of conduct unbecoming an officer and a gentleman for such acts.

II

We next turn our attention to the four offenses bottomed on "fraternization". It is propounded by the Government that there is in the United States Air Force a custom which proscribes unlawful fraternization and

5/ It is unnecessary to show that the conduct of the accused was also of a nature to bring discredit upon the armed forces, this being an alternate method of proving a violation of Article 134, U.C.M.J.

makes actionable the association of officers with enlisted personnel on terms of military equality. We find that the time of the offenses in issue, there did not exist a clearcut standard for gauging so called "fraternization" in the Air Force; as a result, alleged violations grounded on fraternization are not actionable under the U.C.M.J.

We begin with an historical review of the offense of fraternization. Prior to its becoming a separate service, the Air Force was, of course, a part of the U.S. Army. There supposedly existed in the Army a custom of the service that officers and enlisted personnel would not associate together in mutual social activities. However, during World War II, dating between officers and enlisted personnel was commonplace, and if there were any restrictions against such

interaction, they were not enforced. See generally Treadwell, The Women's Army Corps, in UNITED STATES ARMY IN WORLD WAR II (1954). This type of datingapparently did not adversely affect morale and discipline. J. HOLM, WOMEN IN THE MILITARY, AN UNFINISHED REVOLUTION (1982).

When it became a separate service, the Air Force proclaimed that officers and airmen would not generally associate together in social activities; this more progressive attitude was consistent with the less formal atmosphere existing in the Air Force, as compared with the Army. See generally Flatten, Fraternization, 10 A.F. Reptr. 109 (1981). Since that time, the Air Force has promulgated rules which authorize certain activities on the part of Air Force personnel, including those dealing with housing and messing, which

contravene a strict application of what was supposedly a customary prohibition against fraternization.

A booklet on Air Force standards was published in 1977. It did not discuss fraternization, but did provide:

> Since we live and work in a very close environment and endure common hardships, officer and enlisted personnel frequently develop close personal friendships. However, friendships must not interfere with judgment or duty performance. 6/

Within the last decade, the directive governing the assignment of on-base family quarters was changed to authorize officers who were married to

6/ A.F.R. 30-1, Air Force Standards, 30 Sept 77, para 4b.

enlisted members to reside on base, with an option to select whether they resided in officer or enlisted housing. 7/ Prior to that time, such a married couple would not have normally been authorized to reside on base because such was not considered to be in the best interests of the Air Force. 8/ The regulations

7/ A.F.R. 90-1, Assignment of Family Housing, 19 Dec 77, Table 6-4.

8/ A.F.R. 30-6, Occupancy of Public Quarters, 7 Feb 57, para 16c.

> IF ONE SPOUSE IS AN OFFICER OR WARRANT OFFICER, AND THE OTHER IS AN ENLISTED PERSON, assignment to family-type public quarters is not considered to be in the best interest of the service, and such assignment will not normally be made. In this case, both members will be permitted to reside jointly off the base, regardless of the availability of public quarters for their occupancy.

governing the operations of the Open Messes were changed to permit officers and enlisted personnel to patronize each other's clubs as guests. 9/ Traditionally, such patronage was restricted. 10/

In addition, the Air Force has fostered management principles which encourage close interpersonal relationships at the expense of the strict, customary distinction between officers and airmen.

9/ A.F.M. 215-11, Operation of Open Messes, 9 Oct 79, para. 1-11a(2).

> Officer and enlisted open mess members may use one another's open mess as guests. . . The degree to which such privileges are extended or encouraged is a local decision based on membership desires, space limitations, social commitments, and other morale or protocol considerations.

10/ A.F.M. 176-3, Operations Manual for Open Messes and Other Sundry Nonappropriated Funds, 12 May 71.

The reported cases dealing with the subject of fraternization have been few and far between. They include: a U.S. Army officer convicted of inviting an enlisted man to his tent, offering him liquor and then making homosexual advances towards him;11/ a U.S. Marine officer convicted of inviting an enlisted man to his room on base where he gave himliquor and made homosexual advances; 12/ a U.S. Navy officer convicted of taking an enlisted man to the Officers' Club, then to his room on base and there committing acts of sodomy. 13/ In that case, the Court of Military Appeals recommended that actions violative of the

11/ United States v. Livingston, 8 C.M.R. 206 (A.B.R. 1952).

12/ United States v. Free, 14 C.M.R. 466 (N.B.R. 1953).

13/ United States v. Pitasi, 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971).

custom against fraternization should be included in an appropriate regulation so that adequate notice is given to all potential violators. A U.S. Navy officer was convicted of bringing an enlisted man into his apartment to live, and there committing acts of sodomy with him. 14/ One Judge of the U.S. Court of Military Appeals recommended that violations of this type be handled by administrative means. A U.S. Army warrant officer was acquitted of rape, but convicted of drinking with three enlisted personnel, taking them to this house, where he bathed one female and had sexual relations. 15/ A U.S. Army noncommissioned officer was convicted of sleeping in the barracks with two

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14/ United States v. Lovejoy, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970).

15/ United States v. Froelke, 390 F. Supp. 503 (D.D.C. 1975).

enlisted members whom he supervised as first sergeant. 16/ A U.S. Army officer was convicted of committing adultery with an enlisted woman in his chain of command, during duty hours, in the barracks. 17/ Finally, this Court, in an unpublished decision, held that an officer who provided drugs to her subordinates, and then used drugs with them, could be convicted of unlawful fraternization; however, because of an instructional failure, the conviction as to that specification was disapproved. 18/

16/ United States v. Horton, 14 M.J. 96 (C.M.A. 1982) (rev'd on other grounds).

17/ United States v. Jefferson, 14 M.J. 806 (A.C.M.R. 1982).

18/ United States v. Rodriguez, ACM 23545, (A.F.C.M.R. 29 October 1982) (Judge Miller concurring in result, and finding that the Air Force regulations "have not only terminated the existence of the custom [against fraternization], but also the offense that was once chargeable as a violation of that custom.")

In all of these reported cases, some aberrant conduct was in evidence; homosexual activity, alleged rape, supervisors seeking sexual favors from their subordinates and performing indecent acts before others. Notably absent from the opinions in the cited cases is any discussion of voluntary, private, non-deviate sexual activity between of-age officer and enlisted members, who were not associated with one another in any way on duty.

After this review of history and case law, we address the immediate question. To assist us, the Government, in its able oral argument, asks this Court to declare that mere dating between officers and airmen violates custom; that non-deviate, consensual and private sexual intercourse between them violates custom; and finally that marriage between them violates custom, but is a "fait

accompli" against which the Government, yielding to a higher priority, chooses to take no action.

We expressly refuse to so declare. If there exists a customary ban on fraternization, and the avowed reason for such a custom is that fraternization is inimical to good order and discipline in the armed forces, how then could marriage change that effect: In our opinion, the situation would appear exacerbated by the closer relationship spawned by the marriage.

Whether the present situation is good or bad for overall readiness is not the issue before this Court. Rather we must measure the accused's alleged criminal conduct against the "real world" in which all-ranks housing and messing, and officer-enlisted marriages are currently authorized. Given such practices, authorized by regulation, we

cannot say that seeing each other socially and dating is criminal conduct.

Furthermore, once it is acceptable to have officers married to enlisted members, it is logical to conclude that mere dating is also acceptable, since that is nothing more than the socially accepted preliminary stage to such marriages. Also using our common sense and knowledge of human nature and the ways of the world, we note that it is not an uncommon practice for men and women who are dating, with or without marriage in sight, to engage in sexual relationships; in contemporary society such a practice is not considered immoral or unusual.

III

We close our discussion by examining the aspect of the crimes charged with is premised on conduct unbecoming an officer and a gentleman under Article 133, U.C.M.J. Because the words thereof are so broad, it is argued by the accused that the standard set thereby is ambiguous, and the Article fails for vagueness. See generally Nelson, Conduct Expected of an Officer and a Gentleman: Ambiguity, 12 JAG L. REV. 124 (1970). Despite this, the Untied States Supreme Court has held that the Article is not facially vague; therefore, an officer may be punished thereunder for offenses that he has "no reasonable doubt . . . were both 'unbecoming an officer and a gentleman' and 'to the prejudice of good order and discipline in the armed

forces.'" Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

In the evolution of the "Void for Vagueness Doctrine," this rule has emerged: To satisfy the requirements of the Due Process Clause of the U.S. Constitution, a criminal statute must clearly spell out the activity being proscribed so that persons of reasonable intelligence can understand the expected conduct and thereafter conform their conduct to it. Any statute which fails to accomplish this is void. United States v. National Dairy Products, 372 U.S. 29, 83 S. Ct. 594, 9 L.Ed. 2d 561 (1963).

Customs of the service can clarify the general article and help define the standard expected. In order to qualify as such, a custom must be uniform, a known practice of long standing, certain

and reasonable, and not in conflict with existing statutes or constitutional provisions. See Winthrop, Military Law and Precedents, 42 (2d e.d 1920 reprint). Likewise, non-usuage may eliminate a previously well-established custom. M.C.M., 1969 (Rev.), para. 213b. As we discussed earlier, the standards and customs of the prior day, not memorialized by regulation, are no longer effective as such. In the context of the offenses charged here, rather than solving the vagueness becomes even more pronounced; this is so because the customs themselves are unwritten and vague. See generally Nelson, supra.

Looking at the issues from another viewpoint, Congress never intended to regulate the wholly private moral conduct of an individual service member under the general articles. United States v.

Snyder, 1 U.S.C.M.A. 423, C.M.R. 15 (1952). Therefore, it has been consistently held that fornication in the absence of aggravating factors is not an offense under military law. United States v. Snyder, supra; United States v. Berry, 6 U.S.C.M.A. 609, 20 C.M.R. 325 (1956); United States v. Wilson, 32 C.M.R. 517 (a.b.r. 1962). Sharing a bed with a woman without proof of sexual intercourse, is also not an offense absent such aggravating factors. United States v. Prater, 5 B.R. & J.C. 228 (1950).

It is the nature of the acts themselves, the place where they occur, the presence of absence of other people, the military relationship between the officer and the enlisted member, and the likely effects of the incident on the attitude of the enlisted member and

others present which are all important in determining whether sexual acts between officers and enlisted members are unlawful. United States v. Jefferson, 14 C.M.R. 806 (A.C.M.R. 1982); Murphy, The Soldier's Right to a Private Life, 24 Mil. L. Rev. 97 (1964).

With this background on fraternization and conduct unbecoming an officer, we consider the facts of this case on its merits. Clearly the acts of fornication with SrA P. and SSgt. K. had no attendant exacerbating circumstances. They were voluntary, private and non-deviate. If the accused had been an enlisted man, he clearly would not have been culpable.

Concededly, officers are held to a higher standard of conduct than enlisted personnel, and their conduct should be exemplary. However, an act should not be

labelled as criminal if committed by an officer but innocent when committed by an enlisted person, especially when a critical question turns on an interpretation of the law. United States v. Claypool, 10 U.S.C.M.A. 302, 27 C.M.R. 376 (1959).

The only basis for finding the accused culpable for these offenses is that his status as an officer, coupled with the enlisted status of the women, made the acts wrongful. In order to sustain that finding, we must conclude that the acts themselves were criminal because of their surrounding circumstances. 19/ This we find not

19/ ". . . To constitute therefore the conduct here denounced, [unbecoming an officer and gentleman] the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace socially or as a man, the

supportable by the evidence. 20/

We specifically find that as a matter of fact and law the custom in the Air Force against fraternization has been so eroded as to make criminal prosecution against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his

19/ cont.)
offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." Winthrop, Military Law and Precedents, 711-712 (2d Ed., 1920 reprint).

20/ The accused was concerned that his amorous involvements with enlisted women could be wrong. As a result, he consulted his supervisor, Col W., who told the accused that, in his opinion, it would be actionable fraternization if the accused dated enlisted women. Col W. admitted that he was not sure if this were the Air Force policy, however it was clearly his opinion. When pressed by the accused, Col W. gave the accused a copy of the article written by Colonel Flatten, referred to herein, and told to read it since it explained Air Force policy. Our reading of this article reveals that the author believes there is no longer a violation of custom for an officer to "fraternize" with

command nor supervision, unavailable. 21/

Accordingly, only so much of the findings as finds the accused guilty of

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20/ cont.)
an enlisted member, so long as they have no command or supervisory relationship.

Further, testimony at trial from a former wing commander at Minot AFB, indicated that "fraternization" was common on the base.

21/ We do not by this opinion indicate our personal assessment of the moral implications of the conduct described above. We certainly do not mean to imply that the conduct was model, nor that it should be condoned. As reecognized earlier, situations of this type may best be handled by administrative means. Also, we recognized that a stricter rule on fraternization may be required and desirable. This could be done by appropriate service regulation.

We note that the dissenting judges all assert, without citation of relevant precedent, that the activities of the accused were of the type to be prejudicial to good order and discipline. We discern no bedrock authority for such conviction and we conclude that it is based on their personal perceptions of what the standards ought to be, not on a careful analysis of what the standard is in the United States Air Force today.

We are a court of law and are charged with the responsibility of determining existing law and applying it to the facts of a case. It is no part of our duty to

committing adultery, as alleged in Charge II, and of conduct unbecoming an officer for the conduct attendant thereto, as alleged in Specification 1 of Charge I, is affirmed. The remaining findings of guilty are set aside and are dismissed. The sentence is set aside. A rehearing on the sentence is ordered. 22/

Notwithstanding a sizeable body of law to the contrary, the majority has concluded that the prohibition against improper fraternization no longer exists as an offense within the Air Force. My colleagues accurately point out many areas in which the Air Force has fostered the growth of close friendships between officer and enlisted ranks, and, through its own regulations, created circumstances that

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21/ cont.)
conceal what is so or to engage in wishful thinking that the policy ought to be different. In short, we are not a policy making body-such authority reposes in those authorized policy making powers (command).
22/ The government's Motion To File Documents is, DENIED.

could be viewed as eroding fraternization as prohibited conduct.

Likewise Judge Snyder, I cannot logically reconcile the Air Force's position that fraternization that blossoms into marriage is acceptable, while that which continues at a less committed level is wrong. However, I can more readily accept this "pocket of de facto immunity" resulting from marriage than I can the erosion of discipline that, in my view, will result from the elimination of fraternization as an offense.

The prohibition against fraternization by officers with enlisted members is based on preserving military discipline, not social inequality. United States v. Livingston, supra. There is merit in the bromide that "familiarity breeds contempt." In the context of a military community, orders

are to be obeyed, not discussed in the light of the personal relationship between the person giving the order and the individual expected to obey it. Thus it is the time, the place, and the circumstances which dictate the propriety of the relationship between officer and enlisted members. United States v. Free, supra. The prohibition against fraternization within a military organization serves a valid and necessary purpose in maintaining good order and discipline. United States v. Pitasi, supra; United States v. Lovejoy, supra. Accordingly, in my opinion fraternization remains an offense within the Air Force and is punishable under appropriate circumstances.

Finally, assuming, arguendo, that fraternization no longer exists as an offense within the Air Force, the accused's conduct with female enlisted

subordinates clearly amounts to conduct unbecoming an officer and a gentleman. The majority concludes that since the alleged acts, if committed by an enlisted member would not invoke criminal sanctions, the accused officer therefore, lacks culpability. I cannot accept this premise. A higher standard of conduct is required in law of an officer than is required of others. United States v. Means, 10 M.J. 162 (C.M.A. 1981); United States v. Parini, 12 M.J. 679 (A.C.M.R. 1981). The Supreme Court of the United States has stated on several occasions that a military officer holds a position of special trust and responsibility. Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed. 2d 439 (1974); Orloff v. Willoughby, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953). Senior Judge Hemingway concurring in United States v. Newak, 15 M.J. 541, 545 (A.F.C.M.R. 1982), made

clear the expected standard. He wrote:

> Commissioned officers have a special responsibility to conduct themselves in a manner that promotes discipline, obedience and respect. That responsibility cannot be checked at the gate on the way home at the end of the duty day.
>
> [Emphasis added]

An officer who has sexual relations with an enlisted subordinate has acted in a manner that is totally incompatible with promoting discipline, obedience and respect. See generally United States v. King, ___M.J.___ (A.C.M.R. 1983). This erosion of discipline is as true regarding the officer's sexual partner as for other military members who invariably hear of the encounter.

For these reasons, I must with deference dissent from Parts II and III

of the principal opinion.

SNYDER, Judge (concurring in part and dissenting in part):

I fully concur with the holding that the accused's sexual relations with the wife of an enlisted member constitute conduct palpably prejudicial to good order and discipline. Such conduct does not require sophisticated analysis in order to reveal its adverse impact on discipline and morale, especially in light of the fact that military members are frequently required to be absent from their home base for lenghty periods. 1/

However, I dissent from the majority's conclusion that the accused's sexual liaisons with three enlisted women did not constitute conduct unbecoming an officer and gentleman. I will not

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1/ The husband of the accused's partner was performing temporary duty outside the United States during the period of their amorous liaison.

belabor the reader with a point by point dissection of the majority opinion. Suffice it to say that it misses the mark.

Initially, I offer advice to those officers who may mistakenly read the majority opinion as carte blanche to embark upon indiscriminate activities with enlisted personnel of the opposite. In my opinion, the majority result means only that one may not be prosecuted under the U.C.M.J. for conduct similar to the accused's. Commanders retain the full array of administrative sanctions, including administrative termination of commissioned status.

The following quote from the majority opinion indicates the inherent fallacy of its conclusion:

> However, an act should not be labelled as criminal if

> committed by an officer but innocent when committed by an enlisted person . . . . (citations omitted)

That statement assumes that an officer is just like any other military member, although lip service is offered to the contrary.

The fact of the matter is officers are held to a higher standard of conduct; and, demanding that the standard be met can, will, and does result in an officer being held criminally accountable in situations where enlisted members' derelictions may be disposed of nonjudicially. This differential is recognized and sanctioned by the Court of Military Appeals. I offer the following excerpts from the Chief Judge's opinion in United States v. Means, 10 M.J. 162, 165 and 166 (C.M.A. 1981).

Even if appellant's officer status had been a principal factor-indeed, the decisive factor-in the convening authority's decision to refer the case to a general court-martial, appellant would still have no valid constitutional grievance.

* * * *

We find nothing arbitrary about a commander's determination to take officer status into account in referring cases for trial by court-martial. Such an exercise of prosecutorial discretion is quite in line with the consistent recognition that commissioned officers in the Armed Services occupy a special

position of trust and duty.

* * * *

In short, the Armed Services comprise a hierarchical society, which is based on military rank. Within that society commissioned officers have for many purposes been set apart from other groups. Since officers have special privileges 2/ and hold special positions of honor, it is not unreasonable that they be held to a high standard of accountability.

The essence of this principle is that whatever the environment, an officer always has the responsibility of conducting one-self as an officer--be it

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2/ Many of the special privileges referenced by the Chief Judge are no longer a reality. I address this fact later in the opinion.

in a consolidated mess, as an infrequent guest at the noncommissioned officers' open mess, 3/ or as a member of anintramural athletic team. The officer must ensure that undue familiarity does not develop. The fact that the Air Force encourages certain social intercourse in the pursuit of espirit de corps does not detract from this responsibility. However, the official encouragement of such limited intercourse has been misconstrued as a subtle acceptance of all types of relationships between officers and enlisted personnel. A close reading of policy releases on the subject will reveal that not to be the case. The individual responsibility of officers is

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3/ cont.)
Note 9 of the majority opinion omits the following sentence from the referenced regulatory provision: "However, wearing the military uniform in such instances and repeatedly inviting members to one another's open mess is discouraged.

always included.

OFFICER-ENLISTED MARRIAGES: It would be intellectually dishonest for me to even attempt to hypothesize a legally acceptable position on this anomaly. Suffice it so say that because of the system's implicit acquiescence, those who have joined in such marriages enjoy a pocket of de facto immunity. 4/ However, that is not an adequate explanation for the failure to take action, especially where the situation is known prior to the parties marrying. Obviously, such marriages have contributed to the turbulence surrounding he issue.

It is probably safe to say that if these marriages were not "accepted," or

4/ Although a fair number of these marriages are the result of one of the parties thereto obtaining a commission after marrying, that fact does not resolve the issue or reduce the dilemma.

tolerated, the majority opinion could very well be the dissenting opinion. They raise a very fair question: Given their existence, why should one be prosecuted for dating an enlisted person? Perhaps the closest analogy is that failure to prosecute all offenders is no cause to immunize all. However, it should not escape the reader that the desire of others to emulate the conduct which led to those marriages is one possible example of the pernicious impact of officer-enlisted marriages.

The main reason for the post-World War II uncertainty which surrounds this topic continues to be the misconception that the doctrine is grounded on social or intellectual inferiority. Inferiority, perceived or otherwise, has absolutely no bearing on the issue. The only driving force is DISCIPLINE. Anyone

who believes that a leader can mechanically assign a "friend" to unpopular or hazardous duty is unrealistic. Axiomatically, the troops will be highly aware of the duties assigned to an enlisted person(s) with whom an officer habitually associates or consorts. That is the prejudice to good order and discipline which the line between the ranks is meant to prevent; and an officer and a gentleman will endeavor to keep oneself on the appropriate side of that line.

At any rate, making the presence or absence of a supervisory relationship the determining test is also erroneous. Neat compartmentalizations and unit lines have a way of evaporating under combat conditions. An officer's authority and status transcends "unit lines of boundary." Otherwise, e. g., where is

the authority to correct a uniform or other violation of one not a member of the correcting officer's unit?

Because of the adverse impact on discipline, and the compromising position which ensues, I would hold that the accused's actions constituted conduct unbecoming an officer and a gentleman, and affirm all findings of guilty.

Although not necessary for the discussion of the issue before us, I feel compelled to make the following observations. The issue with which we wrestle in this case is not truly the problem. Captain Johanns and others like him are merely manifestations of the symptoms of a larger and pervasive problem, as is the increasing number of courts-martial involving the officer accused. Young officers are assuming their rank without an understanding of

the significance of receiving a commission from the President, or an appreciation of the special trust and responsibility which accompany the commission. To far too many, it is a pay grade rather than a status. But they do not bear the sole responsibility.

It is time for the Air Force's command echelon to squarely address the situation (and in a real sense it is a dilemma), and accept the fact that one reason for the dilemma's existence is the effort to increase the prestige of an increasingly educated enlisted corps. 5/

5/ This is where the misconception concerning inferiority really raises its head. Since probably close to half, if not more, of the enlisted corps holds college degrees, the system cannot be viewed as failing to recognize its talented people. Unfortunately, a significant degree of the prestige bestowed upon the top enlisted grades has been at the expense of the officer ranks--primarily the junior grades.

Allowing the gradual erosion of many, if not all, of the trappings which once accompanied commissioned officer status has contributed to the problem. Why should one act differently if the system treats everyone identically? 6/ The "victims" of this state of affairs are the company grade and lower field grade officers

As Chief Judge Everett opined in United States v. Means, supra, the existence of special privileges creates special obligations. But more importantly, they create a very real incentive to demonstrate one's worthiness to have and to hold special privileges. Perhaps a reemphasis, or resurrection, of

6/ Assigning members in the top three enlisted grades to Visiting Officers Quarters (VOQ) and the blurring of the distinctions between officers' and enlisted members' uniforms are only two examples.

some of those small intangibles will reduce the number of offices who opt to "be one of the guys" rather than a leader.

MILLER, Judge (concurring in part and dissenting in part:

In so far as the majority recognizes that no "custom of the service" exists in the United States Air Force which criminalizes "fraternization" (social intercourse) between officers and enlisted personnel, I concur. See the evidence I presented for this position in United States v. Rodriguez, ACM 23545, 29 October 1982 (unpublished).

In so far, however, a the majority concludes that the absence of such a criminally enforceable "custom" precludes prosecution of those associations between officers and enlisted personnel which any reasonably prudent officer should

immediately recognize are harmful to the maintenance of good order and discipline within the armed forces, I dissent. In my opinion, it is positively ludicrous to imply, as the majority has done in this case, that an officers corps can maintain the dignity and respect necessary to command the unquestioning obedience and trust of enlisted subordinates, if its members are permitted to randomly compete with one half of its insubordinate population for the privilege of engaging that subordinate population's other half in the intimacies of recreational fornication.

Accordingly, in addition to affirming the adultery specification, I would also affirm those specifications that allege conduct unbecoming an officer in that the accused's acts of fornication with enlisted personnel were, by their

very nature, palpably and directly prejudicial to continued good order and discipline in the United States Air Force.

A HISTORICAL ANALYSIS OF THE TERMS "CUSTOM OF THE SERVICE" AND "FRATERNIZATION"

Much has been written in recent case law and legal literature concerning a "long standing 'custom of the service'" that allegedly prohibits "fraternization" between military officers and enlisted personnel. 1/ The general gist of these

1/ See OPJAGAF 1971/69, 30 July 1971; Flatten, Fraternization, 10 Air Force Reporter 109 (Aug 1981). See generally, Nelson, Conduct Expected of an Officer and a Gentleman: Ambiguity, 12 JAG L. Rev. 124 (1970); Murphy, The Soldier's Right to a Private Life, 24 Mil. L. Rev. 97 (1964); J. Holm, Women in the Military, An Unfinished Revolution (1982); M.E. Treadwell, The Women's Army Corps (1954). See also, U.S. v. Rodriguez, supra; United States v. Pitasi, 20 U.S.C.M.A. 601, 44 C.M.R. 31

writings asserts that early in our nation's military history, any social intercourse whatever between officers and enlisted personnel, subjected both categories of offenders to immediate court-martial. it then implies that as our nation's concepts of democratic freedom of association expanded and permeated our military population, lines demarcating such unacceptable social intercourse between officers and enlisted personnel became hopelessly blurred (i.e., the line separating those associations which constituted the per se "custom of the service" offense of "fraternization" from those associations

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1/ cont.)

(1971); United States v. Lovejoy, 41 C.M.R. 777 (N.C.M.R. 1968); United States v. Free, 14 C.M.R. 466 (N.B.R. 1953); United States v. Livingston, 9 C.M.R. 206 (A.B.R. 1952); United States v. Rabb, 81 B.R. 77 (1948; United States v.

associations which were entirely acceptable, changed so rapidly and frequently that any semblance of the "common consent of the governed" necessary to successfully prosecute such "custom of the service" offenses was effectively obliterated).

Specifically, these writings reasoned that because paragraph 213b, MCM (Rev.), 1969, states that a:

> [c]ustom arises out of long established practices which by common consent have attained the force of law in the military or other community affected by them,

then, "custom of the service" offenses, by definition, must cease their existence once the long established and accepted practices upon which they have purportedly been based, change.

Applying this logic to the instant case, the majority, first, correctly notes that it is no longer uncommon for Air Force officers and enlisted personnel to engage in activities that involve mutual social intercourse. Then, after pointing out that such activities violate those long established and accepted general practices upon which the Air Force's ban against "fraternization" is purportedly based, it concludes that the Air Force's "custom of the service" offense prohibiting "fraternization" is no longer viable. It continues that, since fornication is but a particularized type of "fraternization" (albeit, a uniquely intimate one), any prohibitions specifically precluding officers from engaging consenting enlisted personnel in this particular activity has also fallen. Accordingly, the majority

concludes that, today, Air Force officers who fornicate with consenting enlisted personnel (or at least consenting enlisted persons who are not directly subordinate to them) do not commit an offense that is prosecutable under the U.C.M.J.

While I can well under the initial attractiveness of this logic (I erroneously went down the same "rose colored path" in Rodriguez, supra), an in-depth historical analysis of its basic underlying assumptions shows that it is entirely spurious.

CUSTOM OF THE SERVICE OFFENSES

Violations of a "custom of the service," per se, have never been prosecutable in the Army or the Air Force and they can no longer be prosecuted, as such, in any other branch of the armed

forces of the United States. 2/

2/ The term "custom of the service," as descriptive of a type of per se military offense, was used in none of the Articles of War or Army/Air Force Manuals for Court-Martial that pre-dated the U.C.M.J. and its implementing Manual for Courts-Martial. Neither was it ever used in such a sense by Colonel Winthrop in any of his sundry treatises interpreting the various versions of this nation's Articles of War. Nor was it ever used by any of those editors of Army Digest of Opinions who succeeded Winthrop. Rather, any use of the term "custom of the service" in all pre-U.C.M.J. military justice law, manuals, and treatises, was always restricted to either matters of court-martial procedure (including commonly held military definitions of certain word descriptive of the legislatively pronounced elements of some offenses) or determinations of allowable punishments. See, e.g., Winthrop, Military Laws and Precedent, second edition (1920), at 41-42. Absent reduction of a custom or courtesy of the service to a law or regulation, or the independently prosecutable nature of a violator's conduct under the general articles of the Code, or its predecessing Articles of War, its violation was simply non-prosecutable at courts-martial. See, e.g., Winthrop, supra, at 617. Of over 284 opinions involving allegations of offenses involving untoward relationships between officers and

While the term "customs and

2/ cont.)

enlisted personnel reported in the 81 volume JAGD Board of Review Opinions, spanning 1929-1948, the 34 volume JAJD Board of Review Opinions (European Theater of Operations), spanning 1943-1946, and the 12 volume JAGD Board of Review and Judicial Council Opinions, spanning 1949-1951, only five of the least artful even referenced the term "custom of the service." In the only pre-Codal case that actually charged an accused with an Article of War 95/96 offense (prejudicial to discipline, conduct unbecoming) alleging that an accused's conduct was not in accordance with the "customs of the service," the charge was disapproved. See United States v. Jones, supra. In three of the others, each of which was upheld a lesser included Article of War 96 (currently, U.C.M.J., Art. 134(violation of an Article of War 95 (currently, U.C.M.J., Art. 133) conviction, the term was used only as a shorthand reference to the fact that the particular misconduct alleged had always been deemed prejudicial to good order and discipline in past Board of Review Opinions. See United States v. Bunker, supra; United States v. Patterson, supra; United States v. Rabb, supra. In the fifth case, the term was simply a part of the following catch-all sentence: "The

courtesies of the service" has long

2/ cont.)

acceptance by an officer of gratuities from enlisted personnel is subversive of good order and discipline, is contrary to the customs of the service, and to the spirit of...(a specific paragraph of an Army regulation)." See United States v. Price, 42 B.R. 243 (1944).

When the U.C.M.J. (which, in 1950, for the first time, brought all members of United States military services under a single code of justice) was enacted, it continued the legislative tradition of the Articles of War by, again, refusing to recognize mere breaches of military custom or courtesy as a basis for trial by courts-martial. In an effort to placate Navy fears that the new U.C.M.J.'s Article 134 might not encompass all those "custom of the service offenses" that had previously been punishable by the Navy's Articles for the Government of the Navy (see Decker, History, Preparation and Processing, Manual for Courts-Martial, United States, 1951, at pp. 293-294 and footnote 5, herein, infra), the drafter of the 1951 Manual for Courts-Martial specifically mentioned that "a breach of a custom of the service may result in a violation of [the disorder and neglects to the prejudice of good order and discipline in the armed forces] clause of [U.C.M.J.] Article

been used by all United States

2/ cont.)

134 (see M.C.M., paragraph 213b). But, both the language and placement of the quoted phrase, clearly belie any intention of to create a new category of per se offenses for simple breaches of military custom or courtesy; rather, the language simply acknowledges the obvious; to wit: that breaches of military custom and courtesy that also amount to conduct prejudicial to good order and discipline in the armed forces may be charged as a conduct prejudicial to good order and discipline under U.C.M.J., Article 134. Of 34 opinions involving allegations of untoward relationships between officers and enlisted personnel reported in the 50 volume Court-Martial Reports and volumes 1-15 of the Military Justice Reporter, only four reference the term "custom of the service." In the first of these, the term's use is limited to a simple statement that long standing "customs of the service" prohibit officers from engaging in social intercourse with enlisted personnel to the extent that the familiarity induced by such social intercourse affects or prejudices good order of military discipline. See United States v. Livingston, supra. The second, after essentially repeating the language of the first, adds that the

military services to describe

2/ cont.)

determination of which specific social intercourse between officers and enlisted personnel is prejudicial to good order or military discipline must be based upon the circumstances surrounding specific instances of such social intercourse. See United States v. Free, supra. The third, rejects an argument that offenses based upon alleged violations of "customs of the service" are inherently uncertain, indefinite, and unclear, noting that like any other Article 134 offense, the conduct violative of the alleged custom must be shown by its surrounding circumstances to be prejudicial to good order and discipline. See United States v. Lovejoy, supra. And the fourth, representing the Court of Military Appeals' only comment regarding the term, conforms the progressive logic of the first three to that Court's previous holdings regarding the continued validity of all Article 134 charges, extending the progressive logic of Livingston, Free, and Lovejoy so as to recognize that certain acts engaged in by an officer with an enlisted person, may "by their very nature, [be] palpably and directly prejudicial to the good order and discipline of the service," and thus violative of Article 134. See United States v. Pitasi, supra.

It is plainly evident, therefore, that the additional

unwritten traditions of military service, 3/ only the now defunct Naval Courts and Boards, 1937, ever

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2/ cont.)
language of Paragraph 213b, M.C.M. (1951) which specifically noted that the Code's Article 134 prohibition includes any breaches of long standing "customs of the service" that coincidentally meet that Article's criteria, in no way changed the pre-Codal view of "customs of the service." Conduct breaching customs or courtesies of the service may still not be prosecuted in their own right. They continue to be prosecutable only if, coincidentally, the conduct they proscribe, also happens to constitute conduct which is prejudicial to good order and discipline in the armed forces or conduct unbecoming an officer, and, of course, then, they are prosecutable only because they independently violate either U.C.M.J. Article 133, not because they also happen to breach a "custom of the service."

3/ Surveys of current "customs of the service," contained in recent issues of The Air Officer's Guide (an unofficial, but continually updated source book, that Air Force officers are often urged to obtain and read) identify numerous current "customs of the service." A brief sampling, reveals the following diversity:

endeavored to make the simple

3/ cont.)

officers will not walk under umbrellas; an officer's word or statement will ordinarily be accepted without question; officers and airmen will not generally associate together in mutual social activities; when a junior walks with his senior he takes a position abreast and to the senior's left; the word "Sir" must be used when junior officers address senior ones, and by all airmen who address officers; officers should remain at a reception or social gathering until their commander has departed; when a child is born to an officer's family, the base commander is to send a personal letter of congratulations to the parents on behalf of his command; officers will support activities of their units, as well as, activities of the entire base; officers will periodically attend religious services at their base chapels; an officer's uniform and his official or social position must not be defamed; an officer never volunteers excuses; all official communications to superiors must be routed through command echelons; officers do not use vulgar or profane language; excessive indebtedness must be avoided; and airmen and officers stand erect unless seated, they must not lean.

While it is true that the origins of most of these customs are unknown, today, the prohibition against vulgar or profane language

violation of some of these customs, in and of themselves, triable by courts-martial. 4/

3/ cont.)

can be traced back as far as the Ordinance of Richard I, dated 1190 (see Winthrop, supra, at 903) and required attendance at religious services, mandatory use of command echelons in communications, and bans against close officer/soldier associations are traceable back through the Code of Articles of King Gustavus Adolphus of Sweden, dated 1621 (see Winthrop, supra, at 907-918. Indeed, James Thomas Flexner, in his definitive biography of George Washington, characterized the Continental forces' failure to observe the "custom of the service" prohibiting social familiarity between its officers and enlisted people as the greatest problem the general encountered when he assumed command of those forces.

4/ Article 22, Articles for the Government of the Navy (1934 edition) provided:

> (a) Offenses not specified.--
> All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court

(4/ contined)

martial may direct.

> (b) Fraudulent enlistment.--Fraudulent enlistment, and the receipt of any pay or allowance thereunder, is hereby declared an offense against naval discipline and made punishable by general court martial, under this article.

In explaining the meaning of Article 22(a), Article 22(a), Articles for the Government of the Navy (1934 edition), section 5 of Naval Courts and Boards, 1937 (the Navy's former court-martial manual), stated:

> The sources of unwritten naval law are:
>
> (a) Decisions of the courts.
>
> * * * * *
>
> (b) Decisions of the President and the Secretary of the Navy and the opinions of the Attorney General and the Judge Advocate General of the Navy.
>
> * * * * *
>
> (c) Court-martial orders.
>
> * * * * *

(4/ cont.)

(d) Customs and usages of the service.

Circumstances from time to time arise for the government of which there are no written rules to be found. In such cases customs of the service govern. Customs of the service may be likened, in their origin and development, to the portions of the common law of England similarly established. But the custom is not to be confused with usage; the former has the force of law, the latter is merely a fact. There may be usage without custom, but there can be no custom unless accompanied by usage. Usage consists merely of the repetition of acts, while custom is created out of their repetition.

Custom.--The following are the principal conditions to be fulfilled in order to constitute a valid custom:

(1) It must be long continued.
(2) It must be certain and uniform.
(3) It must be compulsory.
(4) It must be consistent.
(5) It must be general.
(6) It must be known.

(4/ cont.)

(7) It must not be in opposition to the terms and provisions of a statute or lawful regulation or order.

As usage constantly observed for a long period results in the establishment of a custom, so long-continued nonusage will operate to destroy a particular custom, that is, to deprive it of its obligatory character.

The field of operation of the unwritten naval law is extensive. It is applied in defining certain offenses against naval law and in determining whether certain acts or omissions are punishable as such, as in cases coming under article 22 of the articles for the government of the Navy. At times, also, custom is appealed to as a rule of interpretation of terms technical to the naval service.

Usage--Mere practices or usages of service, although long-continued, are not customs and have none of the obligatory force which attaches to customary law. The fact that such usages

(4/ cont.)

> exist, therefore, can never be pleaded in justification of conduct otherwise criminal or reprehensible, nor be relied upon as a complete defense in a trial by court-marital. With the permission of the court, however, they may be introduced in evidence, with a view to diminishing to some extent the degree of criminality involved in the offense charged.

While section 98 and 99 of Naval Courts and Boards (1937) incorporated the current U.C.M.J.'s general articles pertaining to conduct prejudicial to good order and discipline and conduct unbecoming an officer into Article 22 of the Articles for the Government of the Navy, it also incorporated: (1) a number of offenses not elsewhere prohibited by the Articles for the Government of the Navy which are currently prohibited by specific Articles of the U.C.M.J. (and which, prior to the U.C.M.J., were prohibited in the Army and Air Force by specific Articles of the Articles of War) and (2) a number of, apparently, per se custom of the service offenses which, although very similar to instances of misconduct currently proscribed by U.C.M.J., articles 133 and 134, required absolutely no proof that the conduct was either prejudicial to good order and discipline or that it constituted behavior unbecoming an officer and a

(4/ cont.)

gentlemen.

In the former category were: (1) affray or disorder, riot, and unlawful assembly, see Navy Courts and Boards, section 92, and U.C.M.J., Article 116; (2) blackmail and extortion, see Navy Courts and Boards, section 93, and U.C.M.J., Article 127,; (3) breaking arrest, see Navy Courts and Boards, section 94, and U.C.M.J. Article 95; (4) burglary or housebreaking, see Navy Courts and Boards, section 96, and U.C.M.J. Articles 129 and 130; (5) embezzlement of money or property not intended for military service, see Navy Courts and Boards, section 100, and U.C.M.J., Article 121; (6) false imprisonment, see Navy Courts and Boards, section 101, and U.C.M.J., Article 97; (7) forgery other than for the purpose of obtaining payment of a claim against the United State, see Navy Courts and Boards, section 102, and U.C.M.J., Article 123; (8) fraudulent enlistment, see Navy Courts and Boards, section 103, and U.C.M.J., Article 83; (9) malingering, see Navy Courts and Boards, section 104, and U.C.M.J., Article 115; (10) neglect of duty, see Navy Courts and Boards, section 105, and U.C.M.J., Article 92(3); (11) resisting arrest, see Navy Courts and Boards, section 106, and U.C.M.J., Article 95; (12) sodomy, see Navy Courts and Boards, section 108, and U.C.M.J., Article 125; (13) uttering forged or counterfeit document other than for the purpose of obtaining payment of a claim against the United States, see Naval

(4/ cont.)

Courts and Boards, section 110, and U.C.M.J., Article 123; (14) willful destruction of non-public property, see Naval Courts and Boards, section 111, and U.C.M.J., Article 109; (15) conspiracy other than to defraud the United States by means of a false claim, see Naval Courts and Boards, section 112, and U.C.M.J., Article 81; (16) perjury and subornation thereof before a judicial proceeding or in a course of justice, see Naval Courts and Boards, section 115, and U.C.M.J., Article 131; 917) aiding escape of a person under arrest, see Naval Courts and boards, section 116, and U.C.M.J., articles 77, 78, and 96; (18) manslaughter, see Naval Courts and boards, section 119, and U.C.M.J., Article 119; (19) assaulting or striking a person not in the navy, see Naval Courts and Boards, section 120, and U.C.M.J., Article 128; 920) rape and carnal knowledge, see Naval Courts and Boards, section 121, and U.C.M.J., Article 120; (21) maiming, see Naval Courts and Boards, section 122, and U.C.M.J., Article 124; (22) robbery, see Naval Courts and Boards, section 123, and U.C.M.J., Article 122; and, (23) arson, see Naval Courts and Boards, section 124, and U.C.M.J., Article 126.

In the latter category were the Navy's per se custom of the service offenses of: (1) scandalous conduct, se Naval Courts and Boards, section 59 (although no specific model specification in the M.C.M. covers such a misconduct, see generally the elements of U.C.M.J.,

(4/ cont.)

Article 133 and the discrediting provision of U.C.M.J., Article 134); 92) breaking quarantine, see Naval Courts and Boards, section 95, and see M.C.M., specification form 173, at A6-25; (3) carelessly or negligently endangering lives of others, see Naval Courts and Boards, section 97 (although no model specification in the M.C.M. specifically covers such misconduct, see generally, M.C.M., specification forms 150 and 151, at A6-22); (4) seduction, see Naval Courts and Boards, section 107 (although no model specification in the M.C.M. specifically covers such misconduct, see generally, the elements of U.C.M.J., Article 133 and the discrediting provision of U.C.M.J., Article 134); (5) unauthorized use of vehicles, see Naval Courts and Boards, section 109 (although no model specification in the M.C.M. specifically covers such misconduct, see generally, U.C.M.J., Article 121(a)(2), M.C.M., specification form 148, at A6-22, and the prejudice to good order and discipline provision of U.C.M.J., Article 134); (6) forging military or naval certificate of discharge or pass, see Naval Courts and Boards, section 113, and see M.C.M., specification form 147, at A6-22; (7) bribery, see Naval Courts and Boards, section 114, and see M.C.M., specification forms 131 and 132, at A6-20 and A6-21; (8) perjury and subornation thereof other than before a judicial proceeding or in a course of justice, see Naval Courts and Boards, section 115, and see M.C.M., specification forms 169 and 170, at A6-25; (9) offenses against the

It is particularly ironic, therefore, that the three appellate cases most often quoted by writers, today, who argue that prosecutions for "fraternization" are based upon its

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(4/ cont.)

postal service, see Naval Courts and Boards, section 117, and see M.C.M., specification forms 160, 161, and 162, at A6-23 and A6-24; (10) offenses against foreign and interstate commerce, see Naval Courts and Boards, section 118, and see M.C.M., specification form 179, at A6-26; (11) receiving stolen goods, see naval Courts and Boards, section 125, and see M.C.M., specification form 179, at A6-26; (12) circulating obscene literature, see Naval Courts and Boards, section 126 (no similar provision is mentioned in either the U.C.M.J. or M.C.M.); (13) polygamy, unlawful cohabitation, adultery and fornication, see Naval Courts and Boards, section 127, and see M.C.M., specification forms 130, 188, 127, and 159, at A6-20, A6-23, and A6-26; (14) narcotics offenses, see Naval Courts and Boards, section 128, and see M.C.M., specification forms 144, 145, and 146, at A6-22; and, (15) wrongful movement of liquor, see Naval Courts and Boards, sec 129 (not specifically addressed by an M.C.M. specification form).

status as a per se "custom of the service" offense (to wit: United States v. Free, 14, C.M.R. 466 (N.B.R. 1953), United States v. Lovejoy, 41 C.M.R. 777 (N.B.R. 1953), and United States v. Pitasi, 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971), are, in fact, the very ones which sounded the judicial death knell for the only per se "custom of the service" offense practice ever recognized in the armed forces, that of the Navy prior to the U.C.M.J.'s enactment. 5/

5/ In 1944, the Judge Advocate General of the Navy, interpreting the limitations imposed upon Articles for the government of the Navy, Article 22, by Naval Courts and Boards (1937), section 5, set aside an Article 22 charge and specification that alleged a naval officer had fraternized with an enlisted man by taking him to dinner, to the theater, and to his hotel room, where he had spent the night with the enlisted man while occupying the same bed. This action was taken because none of the specific facts pleaded in the charge and its specification were sufficient, in and of themselves, to allege any violation of

(5/ cont.)

either written law, as identified by Naval Courts and Boards (1937), section 3, or those unwritten naval laws that could properly be identified by reference to Naval Courts and Boards (1937), Section 5. See United States v. Yocum, CMO 3, 1944, at 412. Since he had earlier recognized that the navy's long recognized "custom of the service" banning fraternization (any social intercourse between its officers and enlisted personnel) was far too general to be enforceable as an Article 22 violation, see CMO 2, 1941, at 271, and because no more specific prohibitions against certain types of fraternization had either been authorized by Navy decisions and opinions or were readily discernible as independent "customs of the service," the Navy Judge Advocate General could, in 1944, have rendered no other decision consistent with his then existing legislative and administrative mandates.

Following enactment of the Code, however, a specification alleging similar conduct by another naval officer arrived in the Navy Judge Advocate General's office. Unlike the former specification, however, this one, having been charged under U.C.M.J., Article 134, carried with it the additional factual allegation that the other facts stated therein were "all to the prejudice of good order and discipline in the armed forces of the United States." Since, U.C.M.J., Article 134, itself, purported to subject to court-martial "all disorders and neglects

(5/ cont.)

to the prejudice of good order and discipline in the armed forces" committed by person subject to the Code, the Judge Advocate General decided to refer it to his newly formed Navy Board of Review for resolution.

The Navy Board, considering the matter in United States v. Free, supra, identified the problem before them as being one of drawing "a line as to where acts of fraternization or association with enlisted men by officers cease to be innocent acts of comradeship and normal social intercourse between members of a democratic military force and become a violation of Article 134 of the Code, prejudicial to good order and discipline in the armed forces of the United State." After noting that efforts "to lay down a measuring rod of particularities to determine in advance what acts are prejudicial to good order and discipline and what are not," it concluded:

> that each case must be determined on its own merits. Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person, experienced in the problems of military leadership, to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted

(5/ cont.)

> person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.

United States v. Free, supra, at 470.

Of additional interest, is the fact that the specification in Free included a "throwback" factual allegation conforming the specification to the outmoded requirements of Naval Courts and Boards (1937), section 5, standards for unwritten naval law (to wit: that the accused's conduct was "in violation of the custom of the Naval service of the United States that officers shall not fraternize or associate with enlisted men on terms of military equality"). After noting that its Judge Advocate General had earlier determined no "custom of the service" exists in the Navy that, per se, precludes the specific types of conduct alleged by the specification, the Navy Court merely noted that "[t]he rule under the U.C.M.J. governing the adequacy of the pleading is that a pleading is sufficient if it informs the accused of what he must be prepared to meet and it, as supplemented by the evidence, is sufficiently definite to eliminate the danger of again being placed in jeopardy for the same offense." Its superfluous inclusion in the specification obviously had no bearing upon the decision rendered in the case.

Seventeen years later, in the first

(5/ cont.)

of two specification that included the term "fraternize" which the United States Court of Military Appeals has considered in its 33 year history, (the navy specification alleging only that the accused naval officer "Willfully and knowingly fraterniz[ed] with one of the Seaman [N] on terms of military equality to the prejudice of good order and discipline") the Court in United States v. Lovejoy, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970) avoided addressing a "vagueness" challenge by finding that the accused's Article 134 "fraternization" conviction had merged with a simultaneous sodomy conviction.

Then, in 1971, the Court of Military Appeals, in United States v. Pitasi, 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971), squarely addressed the sufficiency of a navy specification alleging that a naval officer had "fraternized" and "associated" with an enlisted person:

> . . . in violation of the custom of the Naval Service of the United States that officers shall not fraternize and associate with enlisted men on terms of military equality.

Confronted by a defense contention that "fraternization: is not a cognizable court-martial offense, the Navy rebutted by arguing that "'fraternization' by an officer with an enlisted man has, 'by custom,' always been held to be

(5/ cont.)

prejudicial to good order and discipline in the armed forces." (In view of the Navy's earlier decision in United States v. Yocum, supra, that acts of fraternization or association by Naval officers with enlisted personnel, in and of themselves, do not violate Naval custom, and its later holding in United States v. Free, supra, that when such acts of fraternization or association prejudice good order or discipline they are cognizable by court-martial as a violation of U.C.M.J., Article 134, this rebuttal argument was presumably meant to emphasize the phrase "prejudicial to good order and discipline," and to imply that had the fraternization in Yocum, been alleged as "prejudicial to good order and discipline," as it was in Free, a similar decision would have been reached.)

After briefly consulting Winthrop, supra, and referencing paragraph 213b of the M.C.M., the Court of Military Appeals approvingly quoted those portions of United States v. Free in which the Navy court had discussed the prejudicial effect of intimate types of personal relationships between officers and enlisted personnel on military discipline. Included in these quotes was the standard suggested by the Navy court for determining what acts of fraternization are, and what acts of fraternization are not, prejudicial to good order and military discipline within the meaning of U.C.M.J., Article 134. (For the text of this quotation, see my discussion of Free within this footnote,

(5/ cont.)

supra.)

Having completed its cursory review of the law in the area, the Court of Military Appeals, first, cautioned services against attempting to prosecute any custom, not palpably and directly prejudicial to good order and military discipline, under U.C.M.J., Article 134, by stating:

> These factors, however, do not, in our opinion, relieve military authorities from the obligation of providing some guidelines by which an officer, or those who are called upon to sit in judgment as members of a court-marital, may test what conduct is or is not violative of the "custom," in light of the fact that our armed forces are currently constituted of a large number of citizen soldiers.

And, second, it recommended that, since regulatory proscription of conduct prohibited by a "custom of the service" (even though it be prejudicial to good order and military discipline, and accordingly, otherwise prosecutable under U.C.M.J., Article 134), has the advantage over Article 134, of precise definition, publication, and definite punishment parameters, responsible military authorities should consider reducing all of their existing "custom of the service"

Regardless, then, of how often, and

(5/ cont.)

prohibitions into regulatory form.

Having stated these two ancillary propositions, however, the Court's response to the defense's contention that allegations of fraternization are so vague as not to be cognizable by court-martial, was exceptionally acerbic:

> We in no way intend to depart from our holding in United States v. Sadinsky, wherein we reiterated our prior decision that Article 134 is not void for vagueness, that some acts are by their very nature palpably and directly prejudicial to the good order and discipline of the service. [Citations omitted.]

Unless it is specifically proscribed by another article of the Code, conduct alleged in an Article 134 specification which, by its very nature directly is palpably and directly prejudicial to the good order and discipline of the service, constitutes a violation of Article 134, which is cognizable by court-martial. Whether or not this same conduct, also, happens to violate a "custom of the service," be it prohibition against "fraternization" or any other activity, is completely irrelevant.

by whom, it has been implied that prosecutions for "fraternization" offenses are dependent upon the continued existence of "long standing customs of the service" (or, more specifically, the common recognition of the current vitality of such customs by a vast majority of service personnel), this simply is not the case. Today, unless specific conduct (or a specific type of conduct) (1) violates one of the U.C.M.J.'s specific Articles or (2) it either is palpably and directly "prejudicial to good order and discipline," "service discrediting," or a "crime or offense not capital" under Article 135 or amounts to "conduct unbecoming an officer" under Article 133, it may not be prosecuted at courts-martial.

When determining whether a custom of

the service breach may be prosecuted under the U.C.M.J., the only relevant question to be asked is the one which is entirely dispositive; to wit: Whether the specific or general type of conduct alleged violates any punitive article of the U.C.M.J., including either of its two general articles. Whether the custom of the service allegedly breached is, or remains, viable, is totally irrelevant.

While cynics may argue that the question of exactly what conduct constitutes an offense under either of these two general articles is based to some extent on "customs of the service," I would counter that a critical examination of post-Codal case law reveals, instead, that this precise question has always been uniformly decided either by a disciplined analysis of whether, in fact, one of the specific

"general elements"6/ of the particular general article is or is not satisfied, or by citations to past cases7/ in which a particular offense's existence has already established by such an analysis.

FRATERNIZATION

Before discussing whether the conduct alleged in this case meets one or more of the "general elements" of either of the U.C.M.J.'s general articles, however, it is necessary, first, to

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6/ For an excellent example of such a disciplined analysis, establishing that a specific example of "fraternization" type conduct, in fact, satisfies the "prejudicial to good order and discipline" general element of Article of War 96 (now, U.C.M.J, Article 134), see United States v. Lillis, 39 B. R. 395 (1944).

7/ For excellent examples of such a confirmation of the existence of a general article's offense, despite passing references to "customs of the service," see United States v. Bunker and United States v. Livingston, both supra.

comment upon the very generalized approach that all of my fellow judges have used in their discussions of the specific conduct alleged by the instant specifications. Rather than addressing the specific conduct which the specifications alleged (an officers' indiscriminate "recreational" fornication with enlisted personnel in violation of Article 133 of the U.C.M.J.), they have, instead, chosen to address the question of whether or not a charge of "fraternization" can properly be affirmed as a violation of this Article. In my opinion, it is this patently incorrect statement of the question before the, more than any other single factor, that resulted in their fuzzy and occasionally incorrect handling of those principles necessary to a clear and proper resolution of this case.

An in-depth historical analysis of the most recent 238 military appellate case decisions dealing with allegations generically capable of categorization as "fraternization type offenses" (or untoward officer/enlisted conduct) irrefutably demonstrates my point.

The first recorded use of the term "fraternization" occurred in United States v. Bunker, 27 B.R. 385 (1943). There, an Army Board of Review, apparently confronting contentions that an allegation of conduct which violated the, then recognized, Army "custom of the service" that prohibited any "fraternization" between officers and enlisted personnel could be prosecuted solely on the basis that the alleged conduct violated a "custom of the service," cleverly modified the traditional statement of that customary

ban against fraternization by stating:

> [I]t has long been recognized as a custom of the service that an officer should not fraternize with enlisted men to the extent that it will affect or prejudice good order and discipline." [Emphasis on modifying language provided.]

United States v. Bunker, supra, at 389.

This modifying language was, of course, exceptionally significant. It limited prosecutions for breaches of this particular custom of the service to those few breaches in which the breaching conduct, itself, independently, satisfied the separate criteria for prosecution required by U.C.M.J., Article 134. (Compare the effect of the mollifying

language of M.C.M., paragraph 213b , some eight years later. See note 2, herein, supra.)

Other usage of the term "fraternize" or "fraternization" has occurred in only ten of the remaining 237 case decisions that have dealt with "fraternization type offenses."8/ In five of these, the term

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8/ I do not here consider eight cases that used these terms only in reference to references to regulatory prohibitions against social intercourse between soldiers and foreign nationals in the European Theater, rather than in reference to any proscription against similar relationships between officers and enlisted persons serving together in our Armed Forces. See United States v. Mistretta, 16 B.R. (ETO) 191 (1945); United States v. Van Houten, 18 B.R. (ETO) 65 (1945); United States v. Blankenship, 22 B.R.(ETO) 279 (1945); United States v. Wofford, 24 B.R. (ETO) 346 (1945); United States v. Malott, 27 B.R.(ETO) 259 (1945); United States v. Wilson, 30 B.R.(ETO) 75 (1945); United States v. Newman, 32 B.R.(ETO) 57 (1945); and United States v. Wallace, 34 B.R.(ETO) 131 (1946).

was used to describe several instances of varied officer/enlisted misconduct alleged separately or in combination with one another in one or more specifications.9/ In two of them, it was used solely to describe allegations that an officer had made male/female sexual overtures to an enlisted person.10/ And, in the final there, it was used, once each, in reference to an officer/enlisted homosexual liaison,11/ an officer's behavior in the presence of enlisted men amounting to drunk and disorderly

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9/ See United States v. Patterson, 41 B.R. 365 (1944); United States v. Leonard 16 B.R.(ETO) 279 (1945); United States v. Penick, 19 B.R.(ETO) 257 (1945); United States v. Livingston, 8 C.M.R. 206 (A.B.R. 1952); and United States v. Free, 14 C.M.R. 466 (N.B.M.R. 1953).

10/ See United States v. Morgan, 41 B.R. 73 (1944) and United States v. Brauchler, 15 M.J. 755 (A.F.C.M.R. 1983).

11/ See, United States v. Lovejoy, 41 C.M.R. 777 (N.C.M.R. 1968).

conduct;12/ and, a bar, unsupported, allegation that an officer "wrongfully fraternize[d] with enlisted men (the board dismissed this allegation based upon lack of evidence).13/

Of the entire 238 recorded cases, only five referenced any specifications that included the term "fraternization," and only two of these (one of which, also, included factual allegations as to the manner in which the alleged "fraternization: had occurred) were ultimately affirmed.14/

12/ See United States v. Fiedler, 33 B.R. 189 (1944)

13/ See United States v. Jones, 40 B.R. 149 (1944).

14/ In the sole pre-Codal citation of a specification incorporating a usage of the term "fraternization, an Army board of review in United States v. Jones, supra, dismissed an Articles of War, Article 96, specification alleging simply

(14/ cont.)

that the accused "did... wrongfully fraternize with enlisted men, thereby seriously compromising his position as an officer" because "no substantial evidence whatsoever of [the accused officer's] wrongful fraternization with enlisted men" was presented at trial.

In United States v. Free, 14 C.M.R. 466 (N.B.R. 1953), a Navy board of review, affirmed a conviction pursuant to a U.C.M.J., Article 135, specification, which alleged that the accused

> "did . . . willfully and knowingly, in the room assigned to [him],. . . fraternize and associate with [a private first class] . . . on terms of military equality by having said [private first class] in said room as his... guest and offering said [private first class] . . . alcoholic beverages to drink while his guest in said room and by inviting said [private first class] . . . to sleep in said room as his guest,... all to the prejudice of good order and discipline in the armed forces of the United States."

In doing so, the board specifically found, both, that the accused officer had been "fairly apprised" of the offenses to which the specification pertained and that the officer's behavior had in fact,

What is most significant about these 238 cases is the fact that, in 227 of them, neither the generic term

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(14/ cont.)

prejudiced good order and military discipline in the naval service.

In the third of these five cases, an Article 134 specification alleging that an accused "did . . . willfully and knowingly fraternize and associate with [a seaman] . . . on terms of military equality" by having the seaman as his "guest" in his apartment and sharing with him the cost of food "to the prejudice of good order and discipline" was considered first by the navy court of military review in United States v. Lovejoy, 41 C.M.R. 777 (N.C.M.R. 1969), and then by the Court of Military Appeals in United States v. Lovejoy, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970). The Navy Court, below, affirmed the specification, dismissing a constitutional "vagueness and indefinite" argument as to the specification's sufficiency, by simply stating, without citations, that "After a careful analysis and review of all the circumstances of this case, we arrive at [an] opposite conclusion." The Court of Military Appeals, when faced with an identical argument, above, refused to address the question it presented, opting, instead, to dismiss the specification on other grounds.

"fraternization" nor any of its derivatives was even mentioned! Rather, in these cases, the courts and boards recognized that questions pertaining to whether alleged officer/enlisted misconduct does, or does not, breach a "custom of the service" prohibiting "fraternization" are irrelevant to the legal sufficiency of Article 133 or 134 specifications that allege such misconduct. Accordingly, the limited their consideration of that issue to those few questions that are relevant to wit: whether the misconduct alleged within the particular Article 133 or 134 specification confronting them, was, or was not, of a nature to "prejudice good order and military discipline," "discredit the military service," or amount to "conduct unbecoming an officer and a gentleman."

And, turning from court, to code or manual usage of the term, we find that, unlike the phrase "custom of the service," the term "fraternize" or "fraternization" has never been used in any United States military law or manual for courts-martial.

My fellow judges, the, erred when they chose to define the issue before this Court in terms of a generalized generic notion of fraternization rather than in terms of that factually detailed misconduct which is alleged within the instant U.C.M.J, Article 133 specifications. While those portions of their opinions that relate to the demise of the Air Force's now defunct "custom of the service" banning "fraternization" and the question of whether violations of such a defunct custom may nevertheless still be prosecuted as Article 133

"customs of the service" violations are interesting, they are totally irrelevant to the issue presented by this case. The sole question before us for decision is whether the factually detailed misconduct alleged within the instant Article 133 specifications, under the circimstances of this case, is immediately recognizable by a reasonably prudent officer as an example of conduct that would subject him to potential prosecution for conduct unbecoming an officer and a gentleman.

Unfortunately, by limiting their discussions of the history of "fraternization type cases" to those few cases which actually contained the term "fratnerize" or "fraternizatin," my fellow judges also overlooked some exceptionally useful and exceptionally relevant generalizations pertinent to the resolution of this quintessential

question. Had they expanded their research so as to encompass those cases which, although not mentioning the term "fraternization," nevertheless, dealt with specific allegations of officer/enlisted misconduct alleged to have violated one of the general articles, they would have been able to glean four distinct categories of officer/enlisted behavior recognized time and again by our appellate courts as violating the proper criteria of Article 133 and 134 offenses.15/ Even more

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15/ My personal review of 237 military appellate decisions that have dealt with Article 133 and 134 allegations of officer misconduct in relation to enlisted personnel reveals, without exception, that all such allegations fit neatly into conduct described by one of four sub-headings.

The first of these may be categorized as alcohol related offenses. They include those allegations of conduct in which the courts, under the particular

(15/ cont.)

circumstances of the case, have concluded that, whether by virtue of simple or excessive personal use, or simple provision of the substance to enlisted persons, an officer has demeaned the position of "a commissioned officer" within the eyes of enlisted ranks. See United States v. Hammond, 1 B.R. 83 (1929); United States v. MacIver, 2 B.R. 321 (1931); United States v. Fleming, 2 B.R. 359 (1931); United States v. Lowry, 6 B.R. 67 (1934); United States v. Shirley, 6 B.R. 337 (1935); United States v. Gould, 7 B.R. 49 (1935); United States v. Lowry, 8 B.R. 377 (1937); United States v. Raymond, 10 B.R. 169 (1939); United States v. Hester, 11 B.R. 145 (1941); United States v. Harris, 11 B.R. 171 (1941); United States v. Callan, 12 B.R. 49 (1941); United States v. Bethard, 12 B.R. 67 (1941); United States v. Knight, 13 B.R. 27 (1942); United States v. Brown, 13 B.R. 183 (1942); United States v. Jones 13 B.R. 231 (1942); United States v. Smith, 14 B.R. 371 (1942); United States v. Saul, 15 B.R. 197 (1942); United States v. Taliaferro, 16 B.R. 187 (1942); United States v. Hess, 49 B.R. 231 (1942); United States v. Wall 16 B.R. 233 (1943); United States v. O'Maley, 16 B.R. 285 (1943); United States v. Griffin, 17 B.R. 85 (1943); United States v. Granosk, 17 B.R. 193 (1943); Urited States v. Daly 17 B.R. 333 (1943); United States v. Minnis, 18 B.R. 101 (1943); United States v. Parks, 19 B.R. 23 (1943); United States v. Paradise, 19 B.R. 43 (1943) United States v. Brennan, 19 B.R. 139 (1943); United

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States v. Slaughter, 20 B.R. 9 (1943); United States v. Lyday, 20 B.R. 37 (1943); United States v. Murphy, 21 B.R. 13 (1943); United States v. Westcott, 21 B.R. 41 (1943); United States v. Nelson, 21 B.R. 55 (1943); United States v. Singletary, 21 B.R. 399 (1943); United States v. Baker, 22 B.R. 131 (1943); United States v. Cannon, 22 B.R. 237 (1943); United States v. Johnston, 23 B.R. 57 (1943); United States v. Hyre, 23 B.R. 115 (1943); United States v. Minton, 23 B.R. 159 (1943); United States v. Biggs, 25 B.R. 385 (1943); United States v. Ferguson, 26 B.R. 43 (1943); United States v. Shapiro, 26 B.R. 43 (1943); United States v. Bunker, supra; United States v. Thorn, 29 B.R. 237 (1943); United States v. Gage, 1 B.R.(ETO) 299 (1943); United States v. Nicholson, 1 B.R.(ETO) 397 (1943); United States v. Booker, 2 B.R.(ETO) 325 (1943); United States v. Bradford, 30 B.R. 279 (1944); United States v. Green, 31 B.R. 51 (1944); United States v. Norren, 32 B.R. 95 (1944); United States v. Fiedler, supra; United States v. Watts, 33 B.R. 195 (1944); United States v. Blanton, 33 B.R. 221 (1944); United States v. McPheron, 33 B.R. 325 (1944); United States v. Bates, 34 B.R. 147 (1944); United States v. Martin, 34 B.R. 223 (1944); United States v. Goggin, 34 B.R. 399 (1944); United States v. Roundtree, 36 B.R. 283 (1944); United States v. MacFarlane, 38 B.R. 338 (1944); United States v. Lillis, 39 B.R. 395 (1944); United States v. Jones, supra; United Statess v. Nettles, 40 B.R. 385 (1944);

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United States v. Myers, 41 B.R. 83 (1944); United States v. Patterson, supra; United States v. Rooney, 42 B.R. 119 (1944); United States v. Evans, 42 B.R. 187 (1944); United States v. Price, supra; United States v. Carey, 43 B.R. 261 (1944); United States v. McCoy, 44 B.R. 81 (1944); United States v. Madden, 4 B.R.(ETO) 253 (1944); United States v. Moffit, 7 B.R.(ETO) 113 (1944); United States v. Whalen, 10 B.R.(ETO) 201 (1944); United States v. Buck, 11 B.R.(ETO) 187 (1944); United States v. Gardner, 13 B.R.(ETO) 127 (1944); United States v. Long, 13 B.R.(ETO) 291 (1944); United States v. Glover, 14 B.R.(ETO) 67 (1944); United States v. Newcombe, 14 B.R.(ETO) 93 (1944); United States v. Campbell, 14 B.R.(ETO) 127 (1944); United States v. Wright, 44 B.R. 183 (1945); United States v. Kelley, 46 B.R. 89 (1945); United States v. Foster, 46 B.R. 295 (1945); United States v. Futrell, 47 B.R. 339 (1945); United States v. Ponsler, 51 B.R. 47 (1945); United States v. Packard, 52 B.R. 125 (1945); United States v. Buckner, 53 B.R. 197 (1945); United States v. Mann, 55 B.R. 381 (1945); United States v. Skinner, 17 B.R.(ETO) 317 (1945); United States v. Walker, 18 B.R.(ETO) 33 (1945); United States v. Manning, 18 B.R.(ETO) 201 (1945); United States v. Taylor, 18 B.R. (ETO) 319 (1945); United States v. McBride, 15 B.R. (ETO) 91 (1954); United States v. Leonard, supra; United States v. Thorpe, 19 B.R.(ETO) 245 (1945); United States v. Penick, supra; United States v. Sirois, 20 B.R.(ETO) 21 (1945);

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United States v. Suitt, 20 B.R.(ETO) 265 (1945); United Statess v. Dawson, 21 B.R.(ETO) 95 (1945); United Statess v. Wetherford, 22 B.R.(ETO) 147 (1945); United States v. Hindmarch, 22 B.R.(ETO) 223 (1945); United States v. Shipley, 22 B.R.(ETO) 257 (1945); United States v. Patton, 23 B.R.(ETO) 75 (1945); United States v. Petroski, 23 B.R.(ETO) 81 (1945); United States v. Roberson, 23 B.R.(ETO) 149 (1945); United States v. Tucker, 23 B.R.(ETO) 319 (1945); United States v. O'Hara, 24 B.R.(ETO) 93 (1945); United States v. Vollmer 24 B.R.(ETO) 281 (1945); United States v. Stark, 24 B.R.(ETO) 332 (1945); United States v. Buck, 25 B.R.(ETO) 213 (1945); United States v. St. George, 25 B.R.(ETO) 367 (1945); United States v. Traynor, 25 B.R.(ETO) 377 (1945); United States v. Bradford, 28 B.R.(ETO) 91 (1945); United States v. Ingham, 30 B.R..(ETO), 83 (1945); United States v. Bryant, 30 B.R.(ETO) 291 (1945) United States v. Snyder, 31 B.R..(ETO) 181 (1945); United States v. Marrs, 31 B.R. (ETO) 243 (1945) United States v. Gunning, 32 BR.E.(ETO) 85 (1945); United Statess v. Powell, 33 B.R.(ETO) 221 (1945); United States v. Griffith, 33 B.R.(ETO) 239 (1945); United Statess v. Parkinson, 34 B.R.(ETO) 11 (1945); United States v. Epperson, 58 B.R. 323 (1946); United States v. Pasquariello, 60 B.R. 179 (1946); United States v. Glass, 60 B.R. 185 (1946); United States v. Hart, 60 B.R. 247 (1946); United States v. Clovatre, 60 B.R. 381 (1946); United States v. Shirley, 63 B.R. 65 (1946); United States

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v. Heaton, 64 B.R. 3 (1946); United States v. McMaster, 64 B.R. 171 (1946); United States v. Creighton, 70 B.R. 355 (1947); United States v. Ward, 72 B.R. 301 (1947); United States v. Dows, 73 B.R. 275 (1947); United States v. Becker, 78 B.R. 329 (1948); United States v. Kearbey, 2 B.R.J.C. 281 (1949); United States v. Boraczek, 4 B.R.J.C. 283 (1949); United States v. Powers, 8 B.R.J.C. 111 (1950); United States v. Hansen, 10 B.R.J.C. 165 (1951); United States v. Clarke, 3 C.M.R. 227 (A.B.R. 1951); United States v. Akins, 4 C.M.R. 364 (A.B.R. 1951); United States v. Powers, 5 C.M.R. 206 (A.B.R. 1951); United States v. Livingston, supra; United States v. Jackson, 8 C.M.R. 215 (A.B.R. 1952); United State v. Loney, 8 C.M.R. 533 (A.B.R 1952); United States v. Johnson, 10 C.M.R. 513 (A.B.R. 1953); United States v. Sloan, 14 C.M.R. 375 (A.B.R. 1953); United States v. Free, supra; United States v. Long, 7 U.S.C.M.A. 265, 22 C.M.R. 55 (1956); United States v. McCardle, 27 C.M.R. 1006 (A.B.R. 1958); United States v. Lovejoy, supra; and United States v. Pitasi, supra. For cases prior to 1920, see Winthrop, supra, at 716-717, notes 44 and 47, and 728, note 26.

The second such subheading includes those charges which allege that, under the circumstances alluded to in the cases, an officer somehow either demanded the respect due to commissioned officers and/or subjected his personal impartiality to criticizm by "gambling"

(15/ cont.)

for money with enlisted personnel. Included among these cases, see United States v. Van Hess, 14 B.R. 271 (1942); United States v. Thompson, 14 B.R. 133 (1942); United States v. Cromer, 15 B.R. 17 (1942); United States v. Marinelli, 18 B.R. 377 (1943); United States v. Black, 20 B.R. 345 (1943); United States v. Johnston, supra; United States v. Campbell, 24 B.R. 215 (1943); United States v. Petty, 26 B.R. 213 (1943); United States v. Phillips, 26 B.R. 299 (1943); United States v. Murray, 31 B.R. 389 (1944); United States v. Bates, supra; United States v. Martin, supra; United States v. Lillis, supra; United States v. Futrell, supra; United States v. Garris, 48 B.R. 39 (1945); United States v. Ponsler, supra; United States v. Welch, 56 B.R. 233 (1945); United States v. Stanley, 20 B.R.(ETO) 319 (1945); United States v. Porter, 24 B.R.(ETO) 286 (1945); United States v. Mayfield, 60 B.R. 179 (1946); United States v. Hoover, 3 B.R.J.C. 39 (1949); United States v. Bazanos, 8 B.R.J.C. 33 (1950); United States v. Weller, 10 B.R.J.C. 381 (1951); United States v. Pryor, 2 C.M.R. 365 (A.B.R. 1951); United States v. Reed, 9 C.M.R. 269 (A.B.R. 1952); United States v. Atkinson, 10 C.M.R. 443 A.B.R. (1953); United States v. Villiados, 32 C.M.R. 561 (A.B.R. 1962); United States v. Britton, 13 U.S.C.M.A. 499, 33 C.M.R. 31 (1963); and United States v. Light, 36 C.M.R. 579 (A.B.R. 1965). For cases prior to 1920, see Winthrop, supra, at 716, note 44, and at 727, note 11.

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In the third identifiable subheading of these cases, dealing with allegations that an officer "borrowed" money from enlisted persons, the courts again lookes to the same types of surrounding conditions as they had looked into in the "gambling" type allegations. See United States v. Strickland, 1 B.R. 329 (1930); United States v. Johnston, 4 B.R. 211 (1933); United States v. Sullivan, 5 B.R. 83 (1934); United States v. Gould, supra; United States v. Crist, 12 B.R. 49 (1941); United States v. Curran, 15 B.R. 129 (1942); United States v. Folk, 15 B.R. 307 (1942); United States v. Delbrook 18 B.R. 29 (1943); United States v. Addison, 18 B.R. 171 (1943); United States v. Brunkella, 19 B.R. 289 (1943); United States v. Tillotson, 20 B.R. 149 (1943); United States v. Black, supra; United States v. Westcott, supra; United States v. Nelson, supra; United States v. Hart, 23 B.R. 295 (1943); United States v. Skeen, 24 B.R. 373 (1943); United States v. Peck, 25 B.R. 205 (1943); United States v. Churchich, 26 B.R. 199 (1943); United States v. Hedgess, 27 B.R. 223 (1943); U.S. v. Bedwell, 28 B.R. 229 (1943); United States v. Morrison, 28 B.R. 355 (1943); United States v. Benfield, 29 B.R. 365 (1944); United States v. Maeef, 30 B.R. 53 (1944); United States v. Bohlin, 30 B.R. 209 (1944); United States v. Bradford, supra; United States v. Steele, 30 B.R. 331 (1944); United States v. Van Epps, 31 B.R. 193 (1944); United States v. Young, 31 B.R. 249 (1944); United States v. Murray, supra; United

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States v. Norren, supra; United States v. Clift, 33 B.R. 263 (1944); United States v. Elliott, 34 B.R. 293 (1944); United States v. Robertson, 34 B.R. 321 (1944); United States v. Edwards, 35 B.R. 143 (1944); United States v. Sears, 37 B.R. 39 (1944); United States v. Lowden, 39 B.R. 109 (1944) United States v. Gross, 39 B.R. 133 (1944); United States v. Corcoran, 40 B.R. 235 (1944); United States v. Allgood, 40 B.R. 353 (1944); United States v. Price, supra; United States v. Gilson, 43 B.R. 235 (1944); United States v. Hambright, 5 B.R. (ETO) 287 (1944); United States v. Collins, 8 B.R. (ETO) 219 (1944); United States v. Witmer, 9 B.R.(ETO) 237 (1944); United States v. Moore, 45 B.R. 141 (1945); United States v. MacDonald, 46 B.R. 1 (1945); United States v. McGovern, 46 B.R. 305 (1945); United States v. Jamieson, 47 B.R. 369 (1945); United States v. Wilson, 48 B.R. 71 (1945); United States v. Morris, 51 B.R. 29 (1945); United States v. Giardina, 51 B.R. 291 (1945); United States v. Murray, 53 B.R. 93 (1945); United States v. Phillips, B.R. 31 (1945); United States v. Burbank, 57 B.R. 41 (1945); United States v. Coates, 57 B.R. 157 (1945); United States v. Kuse, 15 B.R.(ETO) 73 (1945); United States v. Stanley, 20 B.R. 319 (1945); United States v. Vollmer, supra,; United States v. Porter, supra; United States v. Wickerson, 25 B.R. (ETO) 295 (1945); United States v. Powell, supra; United States v. Hicks, 58 B.R. 139 (1946); United States v. Zaleski, 58 B.R. 349 (1946) United States v. Heaton,

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supra; United States v. Bryant, 65 B.R. 119 (1946); United States v. Sandsness, 65 B.R. 337 (1946); United States v. Thomas, 65 B.R. 57 (1947); United States v. Dye, 70 B.R. 385 (1947); United States v. Fears, 71 B.R. 37 (1947); United States v. Lach, 71 B.R. 303 (1947); United States v. Vanover, 79 B.R. 189 (1948); United States v. Johnson, 1 B.R.J.C. 343 (1949); United States v. Wilkins, 2 B.R.J.C. 153 (1949); United States v. Cole, 3 B.R.J.C. 159 (1949); United States v. Storm, 11 B.R.J.C. 127 (1951); United States v. St. Ours, 6 C.M.R. (A.B.R. 1952); United States v. Rehmann, 7 C.M.R. 172 (A.B.R. 1952); United States v. Galloway, 8 C.M.R. 323 (A.B.R. 1952); United States v. Wetzell, 12 C.M.R. 269 (A.B.R. 1953); United States v. Scioli, 7 U.S.C.M.A. 502, 22 C.M.R. 292 (1957); United States v. Calderon, 24 C.M.R. 338, (A.B.R. 1957); United States v. Burgin, 30 C.M.R. 525 (A.B.R. 1960); United States v. Villiados, supra; and United States v. Light, 32 C.M.R. 561 (A.B.R. 1965). For cases occurring prior to 1920, see Winthrop, supra, at 714, note 40, at 715, note 42, and at 716, notes 45 and 46.

And finally, the fourth subheading deals with those specifications that have alleged an officer has demaned the respect due him by virtue of his commission, by sexual behavior which a substantial portion of the service's enlisted population required to render this respect deems as scurrilous. See United States v. Kelly, 11 B.R. 257

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(1941); United Statses v. Hightower, 14 B.R. 97 (1942); United States v. Smith, supra, United Stases v. Leavit, 15 B.R. 51 (1942); United States v. Saul, supra; United Statess v. Peterson, 16 B.R. 59 (1942); United States v. Hathaway, 14 B.R. 349 (1943); United States v. Law, 16 B.R. 117 (1943); United States v. Samuels, 22 B.R. 229 (1943); United States v. Hyre, supra; United States; v. Fahey, 26 B.R. 305 (1943); United States v. Hooey, 27 B.R. 5 (1943); United States v. Fowler, 27 B.R. 21 (1943); United States v. Kappes, 27 B.R. 87 (1943); United States v. McFarlane, 28 B.R. 217 (1943); United States v. Sebastian, 28 B.R. 267 (1943); United States v. Breymann, 50 B.R. 1 (1944); United States v. Gage, supra; United States v. Suckow, 2 B.R. (ETO) 199 (1943); United States v. Cookerly, 29 B.R. 99 (1944); United States v. Stone, 32 B.R. 55 (1944); United States v. Arnold, 33 B.R. 69 (1944); United Statess v. McCaffree, 33 B.R. 95 (1944); United States v. Blanton, supra; United States v. Goggin, supra; United States v. Willetts, 35 B.R. 231 (1944); United States v. Gray, 38 B.R. 109 (1944); United States v. Kelly, 39 B.R. 1 (1944); United States v. Porter, 39 B.R. 49 (1944); United States v. Nettles, supra; United States v. Morgan, supra; United States v. Knickerbocker, 42 B.R. 1 (1944); United States v. Shipman, 4 B.R.(ETO) 161 (1944); United States v. Jared, 8 B.R.(ETO) 1 (1944); United States v. Whalen, supra; United States v. Buck, supra; United States v. Long, supra; United States v. Wright, supra;

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United States v. Futrell, supra; United States v. Wagner, 48 B.R. 45 (1945); United States v. Stallworth, 55 B.R. 97 (1945); United States v. MacIntyre, 55 B.R. 151 (1945); United States v. Ritner, 18 B.R.(ETO) 189 (1945); United States v. Traux, 27 B.R.(ETO) 25 (1945); United States v. Pfefferkuch, 27 B.R. (ETO) 265 (1945); United States v. Thompson, 31 B.R.(ETO) 235 (1945); United States v. Gunning, supra; United States v. Kooch, 32 B.R.(ETO) 169 (1945); United States v. Petrie, 33 B.R.(ETO) 133 (1945); United States v. Powell, supra; United States v. Peterson, 59 B.R. 95 (1946); United States v. Bonet, 60 B.R. 191 (1946); United States v. Hart, supra; United States v. Shelton, 62 B.R. 29 (1946); United States v. Martin, 66 B.R. 259 (1947); United States v. McMillen, 69 B.R. 113 (1947); United States v. Slater, 74 B.R. 371 (1947); United States v. Rabb, supra; United States v. Crank, 81 B.R. 289 (1948); United States v. Prater, 5 B.R.J.C. 228 (1950); United States v. Kempe, B.R.J.C. 101 (1950); United States v. Clark, 9 B.R.J.C. 119 (1950); United States v. Dunlop, 10 B.R.J.C. 187 (1951); United States v. Lee, 4 C.M.R. 185 (A.B.R. 1951); United States v. Jewson, 7 C.M.R. 213 (A.B.R. 1951); United States v. Livingston, supra; United States v. Cowan, 12 C.M.R. 374 (A.B.R. 1953); United States v. Rice, 14 C.M.R. 316 (A.B.R. 1953); United States v. Free, supra; United States v. Yeast, 36 C.M.R. 890 (A.F.B.R. 1965); United States v. Lovejoy, supra; United States v. Pitasi, supra; United States v. Horton, 14 M.J.

importantly, they might have recognized that the behavior alleged, here, falls distinctly within the fourth of these actionable categories, demeaning sexual behavior.

THE SPECIFIC QUESTIONS PRESENTED

Having conclusively established that concepts embodied by the terms "custom of the service" and "fraternization" are irrelevant to the question of whether factually detailed Article 133 or 134 allegations of untoward officer/enlisted behavior are legally sufficient to support such specifications, I strip the specifications, before me, of this

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96 (C.M.A. 1982); United States v. Newak, 15 M.J. 541 (A.F.C.M.R. 1982); United States v. Brauchler, 15 M.J. 755 (A.F.C.M.R. 1983); and United States v. King, ___ M.J. ___ (A.C.M.R. 1983). For cases prior to 1920, see Winthrop, supra, at 716, note 44, and at 718, notes 52 and 54.

surplusage.

Accordingly, the instant specifications become Article 133 allegations that the accused, an unmarried Air Force Captain assigned to Minot Air Force Base, did, at Minot Air Force Base, engage in several acts of sexual intercourse each, with a certain female Air Force Sergeant and with a certain female Air Force Senior Airman.

Accordingly, only two questions are germane to my decision. The first is whether or not existing stare decisis identifies multiple acts of fornication by an officer with enlisted personnel as misconduct that is "conduct unbecoming an officer and a gentleman" under Article 133, or, in the alternative, as misconduct that either "prejudices good order and military discipline" or is "service discrediting" under a lesser

included Article 134 specification. The second, which must be addressed only if the answer to the first is negative, is whether in the absence of such stare decisis, a disciplined analysis of the likely effect of such blatant and casual acts of fornication upon the respect required of enlisted personnel for the commissioned status of all officers, might independently establish that the criteria of all officers, might independently establish that the criteria of an Article 133 offense has been met or, in the alternative, whether a similarly disciplined analysis of the likely effect of such acts upon either the continued maintenance of "good order and discipline" within the Air Force or the continued good will of our nation's civilian population toward the Air Force and its leaders, might independently

establish that the criteria of a lesser included Article 134 offense has been met.

CONCLUSION

It is impossible to review the cases I have cited in the fourth sub-heading of note 15, herein, supra, without concluding that the conduct of the accused in this case violated both the Article 133 specification, as alleged, and the lesser included "prejudice to good order and discipline" Article 134 offense, contained within that Article 133 specification. Accordingly, I demur from a more detailed discussion of these cases.

I also recognize that the need for a disciplined analysis of the likely effect of the blatant and casual acts of fornication perpetrated by the accused upon his military inferiors upon the

respect required of enlisted personnel for the commissioned status of all officers is mooted by the above conclusion. I, nevertheless, remain so completely appalled by the cavalier attitude of the accused toward the quintessential responsibilities of any commissioned officer and the majority's discipline shattering acquiescence to it, that I am compelled to briefly comment upon those circumstances of this particular case which causes me concerns.

First, I would point out that there is no other conduct in this nation, which in recent years has generated a more widely divergent and individually self-righteous group of moral attitudes than that related to individual sexual behavior. Indeed, the so-called "Sexual Revolution," has in many instances even pitted individual family member against

individual family member in morally devastating conflicts such as have probably been unequalled in this country since the civil war.

Unquestionably, the tide through this revolution has been toward a greater and greater tolerance of individual sexual proclivity, and as the majority pointed out, even the former military justice prohibitions against military members fornicating with one another, have been decriminalized. But, to this day, few law abiding activities have been so widely viewed or referred to by various segments of our society as illicit, as are those instances of sexual conduct between consenting adults that have generally been decriminalized within the last two decades. Indeed, despite the "decriminalization of such sexual conduct, when it has occurred between

people with certain fiduciary type relationships to one another (e.g., professor-student, executive-junior executive, congressman-page) it has resulted more often, than not, in unquestioned dismissals, scholarly advocation of such dismissals,16/ or unprecedented outrage quelling Congressional reprimands.

It is within this emotionally charged arena, that the accused, a commissioned officer in the United States Air Force, first decided for some unknown reason to consciously push against what he believed to be a questionable Air Force taboo, by engaging a variety of young enlisted women in multiple acts of what one of the young women described at

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16/ See Collins, Managers and Lovers, Harvard Business Review, Sep-Oct, at 142.

trial as "recreational fornication.

Every military officer should immediately recognize that an effective fighting force, which it is their mission to achieve, is absolutely dependent upon the unquestioning obedience of subordinates to command. Further, all military officers should recognize that in order to fulfill their mission of achieving this obedience they must never, knowingly, conduct themselves in a manner that would likely cause even a small portion of their subordinate population to question their moral fiber.

Clearly, it is impossible for an individual officer to obtain the unquestioning obedience of his subordinates if they regard him with moral suspicion or contempt. Accordingly, every military officer is obliged to insure at all times that his

or her moral conduct does not fall to a level that might justify such suspicions, even among a small proportion of his subordinate population. The moment such a commissioned officer's observable moral conduct falls to such a level, is the moment he has become a totally ineffective officer.

The moral conduct required of a military officer cannot, therefore, ever be a mere reflection of his own moral values. In point of fact, it cannot even be a reflection of the moral values of a majority of his subordinates. A military leader can simply not be effective when he can only rely on the unquestioning obedience of 60, 70, or even 90 percent of his subordinates. Particularly, in combat situations, where a single disobeyed order can sometimes result in untold horror for obedient individuals,

he must command the moral respect of virtually everyone that may be subject to his orders.

Had the accused in the instant case any regard whatsoever for his status as a commissioned officer, he would have immediately recognized that his moral behavior, while perhaps not particularly offensive to him would, nevertheless, have been blatantly offensive to that large group of basically fundamentalist church-goers that populated his, and practically every other base in the Air Force (and, some of which undoubtedly were directly subordinate to him). Lacking this regard for his commission, he instead, consciously destroyed not only his own effectuality, but risked the possibility that the emotion charged moral indignation he had aroused might be transferred by these people to other

military officers.

Similarly, by violating his fiduciary-like duty to the moral well-being of his enlisted subordinates17/ he risked subjecting the service to public moral condemnation similar to that which would recently have beset our Congress, had the House of Representatives chosen not to reprimand its members who offended public mores in a similar manner.

Contrary to the overriding concern of the majority, I see no similarity, whatsoever, between the accused's conduct in this case and the conduct of a married officer who engages in sexual relations with his or her enlisted spouse. Here

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17/ See Executive Order 10013, 27 October 1948, as amended by Executive Order 10043, 10 March 1949. See also AFR 50-31, Moral Leadership, 24 October 1969, and its predecesors.

the accused's conduct was actionable because he should have recognized that recreational fornication with a variety of enlisted personnel is still viewed as immoral and promiscuous by a substantial minority of the Air Force enlisted personnel, and that he could not effectively function as an Air Force officer, once such a substantial minority of his subordinates had developed a contemptuous suspicion concerning his moral uprightness. Such conduct on the accused's part clearly amounted to conduct unbecoming an officer and conduct prejudicial to good order and discipline.

I cannot think of a single Air Force group or person that would be offended by an Air Force officer having sex with his or her spouse, nor can I think of a single instance in which such conduct could be said to amount to conduct

unbecoming an officer or conduct prejudicial to good order and discipline.

I would affirm the findings and the sentence as adjudged.

OFFICIAL

LEO B. WEGEMER
Captain, USAF
Chief Commissioner

EXHIBIT "B"

DEPARTMENT OF THE AIR FORCE
Headquarters United States Air Force
Washington, D.C.
20324

REPLY TO
ATTN OF: JAJM ACM 23699 (recon)

SUBJECT: Captain Michael A. Johanns
001-46-5650FR 16 DEC 1983

TO: 8 AF/JA

1. The United States Air Force Court of Military Review has issued the attached Order denying Motion for Reconsideration of the decision of the Court rendered on 26 October 1983 and has set aside the sentence in the attached decision. A rehearing on sentence may be ordered. However, The Judge Advocate

General is certifying the case to the United States Court of Military Appeals in accordance with Article 67(b)(2), Uniform Code of Military Justice (Atch 3). Therefore, do not take action based upon the decision of the Court of Military Review until you receive further instructions.

2. Please arrange to have the accused's copy of the decision and of the certificate of The Judge Advocate General served upon him (Atch 4) and return his signed receipts (Atch 5) to us. If these attachments are to be served by mail, you should include a self-addresed, franked envelope for the accused's convenience in

returning the receipts to your office. If the accused refuses to sign them, forward instead a certificate of service. If service of the decision upon the accused will be delayed, advise us of the reason and approximately when we may expect the receipts.

3. Advise the accused that, pursuant to paragraph 102b, Manual for Courts-Martial, 1969 (Rev), appellate counsel in the Office of the Judge Advocate General has been designated to represent him before the Court of Military Appeals. Also advise him that he has the right additionally to be represented before the Court of

Military Appeals by civilian counsel if provided by him. He should also be advised that the certification of his case by The Judge Advocate General will not in any manner affect his right to petition the United States Court of Miitary Appeals, within the statutory period, with respect to any matter of law in the case.

FOR THE JUDGE ADVOCATE GENERAL

Signed

KEITHE E. NELSON, Colonel, USAF
Director, USAF Judiciary
Office of The Judge Advocate General

5 Atch
1. Decn of COMR
2. Order of COMR
3. Certificate of TJAG
4. Accused's Copy
5. Receipts (2)

EXHIBIT "C"

UNITED STATES COURT OF MILITARY APPEALS

UNITED STATES, Appellant and Cross-Appellee v. Michael A. JOHANNS (001-46-5650), Appellee and Cross-Appellant	)	USCMA Dkt. No. 48445/AF CMR Dkt. No. 23699 ORDER GRANTING CROSS-PETITION

On consideration of the cross-petition for grant of review of the decision of the United States Air Force Court of Military Review, it is, by the Court, this 6th day of July 1984,

ORDERED:

That said cross-petition be, and the same is, hereby granted on Issue III rasied by appellate defense counsel.

Briefs required under Rule 25 will not be filed.

For the Court,*

/s/ John A. Cutts, III
Deputy Clerk of the Court

*Senior Judge Cook did not participate.

cc: The Judge Advocate General of the Air Force

Appellate Defense Counsel (FRAMPTON, Esq.)

Appellate Government Counsel (HOLLIS)

EXHIBIT "D"

UNITED STATES, Appellant and
Cross-Appellee,

v.

Captain Michael A. JOHANNS, U.S. Air
Force, Appellee and Cross-Appellant.

NO. 48,455
ACM 23699.

U.S. Court of Military Appeals.

June 10, 1985.

Accused, a captain, U.S. Air Force, was convicted by general court-martial of four specifications of conduct unbecoming an officer and no specification of conduct prejudicial to good order and discipline or of a nature to discredit armed forces, and he appealed. The United States Air Force Court of Military Review, 17 M.J. 862, affirmed in part and set aside in part. Questions were certified for review and accused's cross

petition for review was granted. The United States Court of Military Appeals, Everett, C.J., held that: (1) officers engaging in mutually voluntary, private, nondeviate sexual intercourse with enlisted member, neither under his command nor supervision, was not violation of article prohibiting conduct unbecoming an officer or article prohibiting conduct prejudicial to good order and discipline or of nature to discredit armed forces, and (2) specification that accused wrongfully had sexual intercourse with enlisted woman, a married woman, not his wife, was multiplicious for findings purposes with specification that accused wrongfully, dishonorably and disgracefully had sexual intercourse with same woman who was, at that time, the lawful wife of active duty enlisted member of United States Air

Force, contrary to customs and traditions of armed forces of the United States.

Affirmed in part and reversed in part.

Cox, J., filed opinion concuring in part and concurring in the result in part.

1. Military Justice 760, 778

Officer's engaging in mutually voluntary, private, nondeviate sexual intercourse with enlisted member, neither under his command nor supervision, was not violation of article prohibiting conduct unbecoming an officer or article prohibiting conduct prejudicial to good order and discipline or of nature to discredit armed forces. UCMJ, Art. 133, 134, 10 U.S.C.A §§933, 934.

2. Military Justice 533

Officers can not be prohibited from attending bona fide religious services with enlisted persons. U.S.C.A. Const. Amend. 1.

3. Military Justice 533

Restrictions on contacts between officers and enlisted persons, male/female or otherwise, can be imposed where there is direct supervisory relationship.

4. Military Justice 959

Specification that accused wrongfully had sexual intercourse with enlisted woman, a married woman, not his wife, was multiplicious for findings purposes with specification that accused wrongfully, dishonorably and disgracefully had sexual, intercourse

with same woman who was, at that time, the lawful wife of active duty enlisted member of United States Air Force, contrary to customs and traditions of armed forces of the United States. UCMJ, Arts. 134, 10 U.S.C.A. §§933, 934.

For Appellant and Cross-Appellee: Major Robert E. Ferencik, Jr. (argued); Colonel Kenneth R. Rengert, Captain Brenda J. Hollis (on brief).

For Appellee and Cross-Appellant: Mary Louise Frampton, Esquire (argued); Colonel Leo L. Sergi, Captain Kathleen G. O'Reilly (on brief).

Amicus Curiae: Eugene R. Fidell, Esquire (argued); Charles S. Sims, Esquire, and Arthur B. Spitzer, Esquire, of counsel--For American Civil Liberties Union Foundation.

Opinion

EVERETT, Chief Judge:

I

Contrary to his pleas, Captain Michael A. Johanns was found guilty by

general court-martial of four specifications of conduct unbecoming an officer, in violation of Article 133 of the Uniform Code of Military Justice, 10 U.S.C. §933, and one specification of conduct prejudicial to good order and discipline or of a nature to discredit the armed forces, in violation of Article 134, UCMJ, 10 U.S.C. §934. The court members sentenced him to dismissal from the armed forces on July 2, 1982. The convening authority approved these findings of guilty and the sentence. The United States Air Force Court of Military Review on October 26, 1983, set aside three of the above findings of guilty under Article 133, 10 U.S.C. §933, and ordered a rehearing on sentence on the remaining findings of guilty. A subsequent government motion for reconsideration of this decision was

denied by the Court of Military Review.

On December 16, 1983, the Judge Advocate General of the Air Force, pursuant to Article 67(b)(2), UCMJ, 10 U.S.C. §867, certified the following questions for review by this Court.

I

UNDER THE CIRCUMSTANCES OF THIS CASE, WAS THE COURT OF REVIEW CORRECT IN NOT SUSTAINING CONVICTION OF CONDUCT UNBECOMING AN OFFICER IN VIOLATION OF ARTICLE 133 AS TO SPECIFICATIONS 2, 3 AND 4 OF CHARGE I?

II

IF THE FOREGOING IS ANSWERED IN THE AFFIRMATIVE, WAS THE COURT OF MILITARY REVIEW CORRECT IN NOT SUSTAINING A CONVICTION OF CONDUCT TO THE PREJUDICE OF GOOD ORDER IN

VIOLATION OF ARTICLE 134 AS TO SPECIFICATIONS 2, 3 AND 4 OF CHARGE I?

Thereafter, on July 6, 194, this Court granted the accused's cross-petition for review on the following question raised by appellate defense counsel:

III

THE SPECIFICATION OF CHARGE II AND CHARGE II SHOULD BE DISMISSED AS THAT SPECIFICATION WAS MULTIPLICIOUS FOR FINDINGS PURPOSES WITH SPECIFICATION 1 OF CHARGE I.

The above questions were raised with respect to the findings of guilty entered at the accused's trial on the following charges and specifications:

CHARGE I: Violation of the Uniform Code of Military Justice, Article 133.

Specification 1: In that CAPTAIN MICHAEL

A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did, at Minot Air Force Base, North Dakota, on or about 5 October 1981, wrongfully, dishonorably, and disgracefully have sexual intercourse with Donna R., Sergeant, United States Air Force, the said Sergeant Donna R. being, at that time, the lawful wife of an active duty enlisted member of the United States Air Force, contrary to the customs and traditions of the armed forces of the United States.

Specification 2: In that CAPTAIN MICHAEL A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did, at Minot Air Force Base, North Dakota, on or about 8 October 1981, wrongfully, dishonorably, and disgracefully fraternize and associate on terms of military equality with enlisted members of the United States Air Force, to wit: Sergeant

Donna R., by going into the military quarters of the said Sergeant Donna R. at Minot Air Force Base, North Dakota and sharing the same bed with the said Sergeant Donna R. while the said Sergeant Donna R. was intoxicated and at a time when the said Sergeant Donna R. was the lawful wife of an enlisted member of the United States Air Force, contrary to the customs and traditions of the armed forces of the United States.

Specification 3: In that CAPTAIN MICHAEL A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did, at Minot, North Dakota, on three or four separate occasions during September, 1981, wrongfully, dishonorably, and disgracefully fraternize and associate on terms of military equality with Staff Sergeant, then Sergeant, Sheryl K., a female active duty enlisted member of the

United States Air Force, by engaging in acts of sexual intercourse with the said Staff Seargeant, then Sergeant, Sheryl K., contrary to the customs and traditions of the armed forces of the United States.

Specification 4: In that CAPTAIN MICHAEL A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did, at Minot Air Force Base, North Dakota, on two or three occasions, during November, 1981, wrongfully, dishonorably, and disgracefully fraternize and associate on terms of military equality with Senior Airman Michelle P., then known as Senior Airman Michelle S., a female active duty enlisted member of the United States Air Force, by engaging in acts of sexual intercourse with the said Senior Airman Michelle P., then known as Senior Airman Michelle P., then known as Senior Airman

Michelle S., contrary to the customs and traditions of the armed forces of the United States.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that CAPTAIN MICHAEL A. JOHANNS, United States Air Force, 91st Strategic Missile Wing, did, at Minot Air Force Base, North Dakota, on or about 5 October 1881, wrongfully have sexual intercourse with Donna R., a married woman, not his wife.

The Court of Military review in its decision below delineated the facts surrounding these offenses as follows:

The accused was a single, 28 year old missile combat crew commander who had been stationed at Minot Air Force Base, North Dakota, since completion of training in 1978. The Officers' Open Mess at Minot was being redecorated; as a

result, officers had been authorized to utilize the facilities of the Noncommissioned Officers' Open Mess. The accused availed himself of the opportunity and socialized at the NCO Club. There he met Sgt. R. (who was married), SrA P. and SSgt K. He dated each and ultimately had sexual relations with them all. On one occasin, the accused and Sgt R. went on a date downtown, and thereafter returned to her house on base. Sgt. R. was intoxicated and therefore remembers nothing other than the next morning the accused was asleep next to her in bed.

All this interaction was completely consensual, private, nondeviate, and sometimes instigated by the women involved. The accused was neither the commander nor supervisor of any of these enlisted members, and their respective

relationships were not publicized.4/ In the opinion of the enlisted women, the accused's activities were neither dishonorable nor service discrediting. The charges resulted from the apparently private, voluntary liaisons. United States v. Johanns, 17 M.J. 862, 964 (A.F.C.M.R. 1983).

The Government had contended before the United States Air Force Court of Military Review that there was a custom in the United States Air Force which prohibited fraternizations with and made criminal the associate of officers with enlisted personnel on terms of military equality. However, the court below found that at the time of the offenses in

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4/ It was stipulated at trial that the allegations were brought to the attention of the accused's commander by a member of his squadron on the basis of inferences he drew from conversations with the accused.

issue, "there did not exist a clearcut standard for gauging as called 'fraternization' in the Air Force". Furthermore, the court

> specifically [found] that as a matter of fact and law the custom in the Air Force against fraternization has been so eroded as to make criminal prosecution against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable.

United State v. Johanns, supra at 869.

II

In Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), the Supreme Court emphasized that "the military is, by necessity, a specialized society separate from civilian society."

Id. at 743, 94 S.Ct. at 2555. Moreover, "to maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'" Id. at 744, 94 S.Ct. at 2556. The Supreme Court pointed out that Articles 133 and 134 of the Uniform Code have a lineage extending back more than three centuries, it. at 745-46, 94 S.Ct. at 2556-57; and that "[d]ecisions of this Court during the last century have recognized that the longstanding customs and usages of the services impart accepted meaning to the seemingly imprecise standards of Arts. 133 and 134." Id. at 746-47, 94 S.Ct. at 2557. Thus, in 1857, the Court had "upheld the Navy's general article, which provided that "[a]ll crimes committed by persons

belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea.'" Id. at 747, 94 S.Ct. at 2557, citing Dynes v. Hoover, 20 How. 65, 15 L.Ed. 838 (1857). The rationale for this result had been that,

> [n]otwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts martial, and the offenses of which the different courts martial have cognizance. Ibid.1/

1/ The court also pointed to Smith v. Whitney, 116 U.S. 167, 6 S.Ct. 570, 29

In considering Captain Levy's contention that Articles 133 and 134 were "void for vagueness" under the Due Process Clause of the Fifth Amendment, the Supreme Court concluded that, "[f]or the reasons that differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." 417 U.S. at 756, 94 S.Ct. at 2561. "Because of the factors

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(1/ cont.)

L.Ed. 601 (1886); United States v. Fletcher, 148 U.S. 84, 13 S.Ct. 552, 37 L.Ed 378 (1893); and Swaim v. United States, 165 U.S. 553, 17 S.Ct. 448, 41 L.Ed. 823 (1897), in support of its thesis that "the usages and customs of war" and "training and experience in the service" give precision to the general prohibitions contained in Articles 133 and 134.

differentiating military society from civilian society," the Court held

> that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statues regulating economic affairs.

Id. at 756, 94 S.Ct. at 2562. Consequently, Levy's attack on Articles 133 and 134 for vagueness was rejected because he "could have had no reasonable doubt that his public statements urging Negro enlisted men not to go to Vietnam if ordered to do so were both 'unbecoming an officer and a gentlemen', and 'to the prejudice of good order and discipline in the armed forces.'" Id. at 757, 94 S.Ct. at 2562.

[1] Obviously, the premise for this result in Parker v. Levy was that, in view of the military customs, usage, and

training, the accused could not successfully claim that he lacked constitutionally required notice under the more relaxed standard of measuring void-for-vagueness. However, because that premise is inapplicable to Captain Johanns, the result here must be that reached by the Court of Military Review. Cf. Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2L.Ed.2d 228 (1957); United States v. Tolkach, 14 M.J. 239 (C.M.A. 1982).

In discussing Article 133, the Manual for Courts-Martial in effect when Johanns was tried explained:

> Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the individual as an officer, seriously compromises his character as a gentleman, or action

> or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously compromises his standing as an officer.

Para. 212, Manual for Court-Martial, United States, 1969 (Revised edition). (Emphasis added). With respect to disorders and neglects to the prejudice of good order and discipline in the armed forces, the Manual remarked:

> Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, the article does not contemplate these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.

* * * * * *

A breach of a custom of the service may result in a violation of this clause of Article 134. In its legal sense the work "custom" imports something more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common consent have attained the force of law in the military or other community affected by them. There can be no such thing as a custom that is contrary to existing law or regulation. A custom which has not been adopted by existing statue or regulation ceases to exist when its observance has been long abandoned. Many customs of the service are now set forth in regulations of the various armed forces. Violations of those customs should be charged under Article 92 as violations of the

regulations in which they appear. Para. 213b, Manual, supra. [Emphasis added). The language of the 1951 Manual for Courts-Martial is almost identical. See paras. 213, 213b, Manual for Courts-Martial, United States, 1951; see also paras. 182, 183, Manual for Courts-Martial, United States Army, 1949 (discussing Articles of War 95 and 96). Interestingly, none of these three Manuals contains a form specification for "fraternization". See App. 6 c, 1951 Manual; App. 4, 1949 Manual.

Consistent with these Manual provisions, this Court has indicated that Article 134, 10 U.S.C. §934, is not intended "to regulate the wholly private moral conduct of an individual." See United States v. Berry, 6 U.S.C.M.A. 609, 614, 20 C.M.R. 325, 330 (9156); United States v. Snyder, 1 U.S.C.M.A. 423, 427,

4 C.M.R. 15, 19 (1952). These pronouncements have been interpreted to mean that, "[f]ornication in the absence of aggravating circumstances is recognized as not an offense under military law." See United States v. Wilson, 32 C.M.R. 517, 518 (C.M.R. 1962). Certainly officers hold a special status whereunder a higher standard of conduct is required of them by law and custom. United States v. Means, 10 M.J. 162 (C.M.A. 1981). Nonetheless, even for an officer, private fornication in the absence of some other aggravating circumstance would not seem subject to prosecution under Articles 133 and 134--regardless of the moral censure to which this activity might be subject.

If the officer's sexual partner is an enlisted person, does this constitute sufficient aggravation to make private

fornication subject to prosecution? For two reasons, the answer to this question depends on whether there was a custom proscribing this type of relationship. In the first place, if such a custom existed, the violation of that custom would tend to have a much more direct and palpable effect on good order and discipline and would more seriously compromise the officer's standing. he would be perceived as flouting military authority--which, of course, no officer may do.

Secondly--and constitutionally more important--the existence of such a custom would provide notice to officers, so that they would have no reasonable doubt as to the legal requirements to which they are subject. Obviously, "not every social contact between an officer and enlisted man is or even can reasonably be

prohibited. To do so would be inconsistent with our democratic concept of social relations and, probably, unavailing." See United States v. Pitasi, 20 U.S.C.M.A. 601, 608, 44 C.M.R. 31, 38 (1971). Custom can help define which relationships between officers and enlisted persons are improper.

Customs differ among the armed services. Coast Guard customs and regulations still allow the wearing of a beard, as did the Navy until recently; but the other services require their members to be clean-shaven. In the Army, an officer still may not protect himself from rain with an umbrella; but in the Air Force this custom has been abandoned. Indeed, the Air Force--the most recently created of the armed services--has never honored some of the customs recognized in the senior

services; and perhaps because both officers and airmen at one time served together in small flight crews, the barriers placed by custom between officers and enlisted persons have probably always been lower in that Service than in others.

Undoubtedly, the entry into the armed services of large numbers of "citizen soldiers" during World War II, the Korean War, and the Vietnam War led to abandonment of the observance of many military customs. Cf. para. 213a of the 1969 and 1951 Manuals, both supra. Moreover, since few women other than nurses served in uniform before World War II, there was little opportunity for custom to develop concerning officer-enlisted relationships where different sexes were involved. Indeed, as officer-enlisted marriages have been

increasingly condoned by service directives, it has become increasingly difficult for servicepersons to infer that officer-enlisted dating and social contact--an inevitable prelude to wedlock--are forbidden by custom.

The uncertainty as to the proper perimeters of social contacts between officers and enlisted persons--especially when they are of different sexes--led this Court to comment fourteen years ago concerning fraternization: "While the drafting of an appropriate regulation might be difficult, we recommend it to the responsible military authorities." United States v. Pitasi, supra at 608, 44 C.M.R. at 38. Apparently, this suggestion was not heeded by the Air Force, for we have been cited no directive of that Service which specifically deals with fraternization or

with the type of relationship in which Captain Johanns was involved. Moreover, as already noted, previous Manuals for Courts-Martial did not treat this topic--although a form specification for fraternization is now included in the 1984 Manual. See para 83f, Part IV, Manual for Courts-Martial, United States, 1984.

The Air Force Court of Military Review apparently determined that no custom of that Service prohibited Captain Johanns' private sexual relationships with several enlisted women. 2/ In the face of this determination by a tribunal which has factfinding powers, it must be assumed that Johanns did not receive notice from an Air Force custom or long-

2/ Indeed, if the court below had found that such a custom existed, there could be serious concern as to the basis for such a finding.

established practice that his amorous activities might transgress Articles 133 and 134. Significantly, Captain Johanns made an effort to determine whether Air Force policy forbade sexual involvements with enlisted women. In response to his inquiry, his supervisor gave him a copy of an article in an Air Force publication which had been written by a highly regarded judge advocate. See Flatten, Fraternization, 10 Air Force Reporter, 109 (1981). According to the Court of Military Review, "Our reading of this article reveals that the author believes there is no longer a violation of custom for an officer to 'fraternize' with an enlisted member, so long as they have no command or supervisory relationship." United States v. Johanns, supra at 869 n.20.

Although the barriers separating officers and enlisted persons in the Air Force may be lower than in the other services, the problem of fraternization is not limited to the Air Force. In United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984), the United States Army Court of Military Review held defective two specifications under Article 134 alleging "fraternization" between a male staff sergeant and two female privates. In an opinion by Judge Yawn, the court observed:

> The conduct proscribed by the general article has always been confined to cases where the prejudice is direct and palpable. Such conduct must be easily recognizable as criminal; must have a direct and immediate adverse impact on discipline; and

> must be judged in the context in which the years have placed it ... The allegations against appellant fail to meet this test.

Id. at 829 (emphasis added). Subsequently, on November 29, 1984, the Army issued new guidelines with examples in order to clarify the limitations on social contacts between officers and enlisted persons. See HQDA LTR 600-84-2 (Letter from MG Robert M. Joyce, USA. The Adjutant General, 23 November 1984).

[2,3] Obviously, clear directives as to permissible contacts between officers and enlisted persons will obviate the issues present in this case. Under the First Amendment and also in light of the Supreme Court's interpretation of Article I, Section 8, Clause 14 of the Constitution in O'Callahan v. Parker, 395 U.S. 258, 89

S.Ct. 1683, 23 L.Ed.2d 291 (1969), some social contacts may be constitutionally protected. For example, officers could not be prohibited from attending bona fide religious services with enlisted persons. Cf. United States v. Milldebrandt, 8 U.S.C.M.A. 635, 25 C.M.R. 139 (1958); United States v. Wysong, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958); United States v. Nation, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958). On the other hand, restrictions on contacts - male/female or otherwise - where there is a direct supervisory relationship, can be imposed. However, we need not speculate further about the legality of hypothetical directives that may be issued at some future time.

III

[4] With the respect to the case at hand, it appears that Captain Johanns

lacked the notice from custom or otherwise which, even under the relaxed standard of review established by Parker v. Levy, supra, is constitutionally necessary to meet the due-process requirements of the Fifth Amendment. Therefore, the Court of Military Review properly dismissed specifications 2, 3 and 4 of Charge I; and the two certified questions must be answered in the affirmative. Because of multiplicity, the findings of guilty under Charge II must also be dismissed. United States v. Rodriguez, 18 M.J. 363 (C.M.A. 1984).

Accordingly, so much of the decision of the United States Air Force Court of Military Review as affirmed the findings of guilty of Charge II and its specification is reversed. The findings of guilty of that Charge and its specification are set aside and that

Charge and its specification are dismissed. In all other respects, the decision of the United States Air Force Court of Military Review is affirmed.

Judge FLETCHER concurs.

COX, Judge (concurring in part, concurring in the result in part):

The Judge Advocate General of the Air Force certified the following question:

> UNDER THE CIRCUMSTANCES OF THIS CASE, WAS THE COURT OF REVIEW CORRECT IN NOT SUSTAINING CONVICTION OF CONDUCT UNBECOMING AN OFFICER IN VIOLATION OF ARTICLE 133 AS TO SPECIFICATIONS 2, 3, AND 4 OF CHARGE I?

Believing the evidence to establish beyond any reasonable doubt that the conduct of the accused was conduct

unbecoming an officer, I would have no difficulty in answering the question in the negative. 1/

The key issue presented in this case is whether the conduct of the accused violates Article 133, Uniform Code of Military Justice, 10 U.S.C. § 933. There are many kinds of relationships between officer and enlisted personnel, regardless of sex. Most of these relationships do not ripen into conduct which could be deemed unlawful. However, when the relationship between an officer and several enlisted members of the opposite sex does ripen into obvious and

1/ Inasmuch as I believe there is ample evidence to conclude that the accused was guilty of conduct unbecoming an officer and a gentleman, I would have no hesitancy in answering the second certified question in the negative as well, but for the factual findings of the Court of Military Review, since conduct unbecoming an officer and a gentleman is clearly prejudicial to good order and discipline.

open sexual relationships, including, as in this case, one adulterous relationship which even the Court of Military Review found criminal, then, in my opinion, such conduct becomes "unbecoming an officer and a gentleman," a violation of Article 133.

I reach this conclusion without traversing the convoluted paths of "fraternization" and "customs of the Air Force." There are certain standards of conduct expected of those who belong to the officer corps which are understood by them and which exceed the standards that apply to civilians. Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); Dynes v. Hoover, 20 How. 65, 15 L.Ed. 838 (1857). Conduct that does not meet these standards, under certain circumstances, amounts to a violation of Article 133. While I would not attempt

to define the exact parameters of the conduct proscribed by Article 133, I have no doubt that the accused's conduct here does fall within those parameters. And I have no doubt that most officers would agree with me, as did the court-martial members, the military judge, the staff judge advocate, the convening authority, and three judges of the Court of Military Review.

Had this case been pleaded, tried, and affirmed below simply along these lines, I would have sustained the findings of the trial court. However, the pleading and the military judge's instructions added the additional element of "fraternization," a concept difficult of definition and certainly difficult to establish as violative of a "custom of the service," since it occurs in both the permissible and impermissible forms. Pre-

occupation with this concept is what led the Court of Military Review astray.

The majority of the Court of Military Review seems to have regarded the question as simply whether "there is in the United States Air Force a custom which proscribes unlawful fraternization and makes actionable the association of officers with enlisted personnel on terms of military equality." United States v. Johanns, 17 M.J. 862, 865 (A.F.C.M.R. 1983). While the majority never undertook to define "fraternization," they noted the absence in the case law of "any discussion of voluntary, private, nondeviate sexual activity between officer and enlisted members who are of age, who were not associated with one another in any way on duty." Presumably, it was such conduct, without more, that the majority of the Court of Military

Review found to be not prohibited by custom in the Air Force.

As I read the record of trial, the accused was convicted of quite a different offense. To be sure, the trial judge instructed the court members that, as to each of the specifications, they must find that certain conduct occurred and that it constituted "fraternization" as:

> to associate with another or others on equal terms. Not all associations between Air Force officers and enlisted personnel are wrongful. It is the appropriateness, of the time, place, circumstances, and conduct which is the determinant. To be wrongful, the fraternization must be of such a nature as <u>to demean the officer, to detract from the</u>

> respect and regard for authority inherent in the military relationship between officers and enlisted. Essentially, to establish fraternization, the prosecution must prove that the association with enlisted personnel was under such circumstances which were prejudicial to good order and discipline in the armed forces.

(Emphasis added.)

Further, he defined "conduct unbecoming an officer and a gentleman" for the court as:

> actions or behavior in an official capacity, which in dishonoring or disgracing the individual as a commissioned officer seriously compromises his character as a gentleman, or action or behavior

> in an unofficial or private capacity, which in dishonoring or disgracing the individual personally, seriously compromises his standing as a commissioned officer. To constitute unbecoming conduct, the misbehavior should not be slight, but must be of a material and pronounced character. Unbecoming as used here, refers to behavior which is not merely inappropriate or unsuitable, such as not in good taste, against propriety, or not consonant with usage, but rather which is morally unbefitting and unworthy.

(Emphasis added.)

In other words, the accused was not convicted of just dating or casual sex with enlisted servicewomen; he was convicted of carrying on these activities

in such a manner as to cause these specific deleterious effects on his own status as an officer and on military good order and discipline in general. And it should be pointed out that, at trial, the defense specifically agreed that the type of "fraternization" described by the military judge violated a custom of the Air Force. Their argument was simply that the accused's activities did not meet the threshold of this type of "fraternization." The court members, obviously, believed otherwise.

What was the evidence that showed this impact on military authority? Even though the only witnesses in the trial were the accused's paramours (all of whom expressed the utmost respect and admiration for him and denied that anyone else in the world had any inkling of their relationship with him), it is not

difficult to detect the open and notorious nature of his associations. 2/

2/ The following excerts from the record of trial are illustrative:

[Testimony of Staff Sergeant Sheryl K.]

[TC] How did you happen to meet the accused?
[WIT] I was introduced to him by a co-worker of mine.

* * * * * * *

I was down in the missile wing DO office. A friend of mine introduced Captain Johanns out of courtesy.
Q Was that friend another enlisted person?
A Yes sir.
Q And who was that?
A Sergeant Finnegan.
Q After that first meeting, did you have any other contact with the accused?
A Yes sir.

* * * * * * *

Q What was the nature of that contact?
A We went out on a few dates.

* * * * * * *

Q Sergeant [K.], at any time did you have sexual intercourse with the accused?
A Yes sir.
Q Do you recall how many times?

2/ Note 2 - Continued

A Three or four. I don't keep count.

* * * * * *

Q At what point in time did you break off your relationship?
A It was in September.
Q And why was that?
A (Pause)
Q Did you have any reasons?
A No sir.
Q Was the accused dating anyone else?
A He was dating several others.

* * * * * * *

[Testimony of Sergeant Donna R.]

[TC] Sergeant [R.], do you know when you first met the accused?
[WIT] It was at a promotion party, I believe. I'm not sure of the exact date, sir.
Q Where was that?
A The NCO Club, here on base. [See Note A, infra.]
Q Were you introduced to him by some?
A Yes sir, I was.
Q Who was that?
A Sergeant [K.].
Q That is Staff Sergeant [K.]?
A Yes. She was a buck sergeant at the time.

* * * * * *

Q Let me draw your attention to the 5th of October of last year. Did you have any contact with the

With this reservation, I join in the result reached by the Chief Judge. I agree that the specification of Charge II is multiplicious with specification 1 of Charge I. United State v. Rodriguez, 18 M.J. 363 (C.M.A. 1984).

2 Note 2 - Continued

accused on that date?
A Yes sir, I did.
Q Would you please tell the court what that was?
A It was at the NCO Club here on base. I was over there with a friend, Staff Sergeant Pierce, Leslie Pierce, and we were over there having a few drinks and Captain Johanns and a couple of his friends walked in. He didn't come over right away. He came over after he had a drink or so. He came over and visited with us for a few minutes, and were were talking, and he asked me over to his trailer.
Q On the 5th of October, when you met him as you say, were you married?
A Yes sir, I was.

* * * * * *

Q Now, after the accused invited you over to his trailer, did you go?
A Yes sir I did.
Q Where is that trailer located?
A In the trailer court on base, sir.
Q Were you wearing a wedding band?
A Yes sir, I was.
Q. Sergeant [R.], when you went to his trailer, did you engage in sexual intercourse with the accused?
A Yes sir, I did.
Q Now, after the 5th of October, did you ever [sic] any other contact with him?
A Yes sir, I did.
Q When was that?
A It was on the 8th of October.

2/ Note 2 - Continued

Q And what happened on that day?
A I was going down to Friday's bar in downtown Minot with two other friends, and I invited Captain Johanns to go along. We all went in my car; I drove down. The four of us all went together.
Q The two other friends, were they enlisted?
A Yes sir, they were.
Q All right, go ahead. What happened then?
A We went to Friday's and it was mainly a social event; everybody was on a first name basis that night, and I'm not sure of the exact amount of drinks we had. Everybody was having a pretty good time.
Q Were you there very long?
A Until closing sir. About one or one-thirty I would say.
Q Did you have many drinks?
A I would say a few. I don't know the exact amount.
Q Do you think you were intoxicated when you left?
A I know I was. I'm not sure about anybody else.
Q That happened after the bar closed?
A We all proceeded to come back to base. I didn't drive. Airman First Class Desserine drove back.
Q Where was the accused; was he in the car with you?
A Yes sir, he was.
Q What happened?
A After we got back to base, Airman First Class Desserine dropped himself off at his dorm, I believe, and the Sergeant Kraft drove to his

2/ Note 2 - Continued
dorm and dropped himself off, and from what I can recall, Captain Johanns drove me to my house.
Q Do you recall then what happened?
A We went inside. I put my dogs out. I went upstairs to change clothes and that is all I can remember.
Q Do you recall asking the accused to spend the night with you?
A No sir, I don't remember.
Q What happened, Sergeant [R.], when you woke up the next morning.
A Captain johanns was in the bed beside me.
Q Do you recall whether or not you engaged in sexual intercourse with him?
A No sir, I don't.

* * * * * *

Q Did the accused know, on both dates, that you were married?
A Yes sir, he did.

* * * * * *

Q Did he ever express any concern about your husband finding out?
A Yes sir, he did.

* * * * * *

Q You said you knew Sergeant[K.]. Did she ever speak to you concerning the accused?
A Yes sir, she did.
Q What did she tell you?
A Basically, just the problems that she was having seeing him, liking

1/ Note 2 - Continued
him, things like that.
Q Did she tell you she was going out with him?
A Yes sir, she did.

* * * * * *

Q Sergeant [R.], do you know a Lieutenant [T.]?
A Yes sir, I do.
Q Did you ever go over to his home?
A Yes Sir.
Q Who else was there?
A Sergeant [K.], my husband, Captain Johanns, Lieutenant [T.'s] wife at the time. [See Note B, infra.]
Q And Lieutenant [T.]?
A Yes sir.

* * * * * *

[Testimony of Senior Airman Michelle P.]
[TC] How do you happen to know the accused?
[WIT] I met him through a mutual friend, sir.
Q Who was that?
A Sergeant Finnegan.

* * * * * *

Q After you first met him, did you have occasion to see the accused again?
A Yes sir.
Q When was that?

2/ Note 2 - Continued

A Well, since the time I met him, around September or October, I seen him quite frequently in the club and in a social circumstance at Lieutenant [T.'s] house.
Q Who else was there?
A At the club?
Q At lieutenant [T.'s]?
A There was Donna and Sheryl; they were in here today; Sergeant Finnegan, Donna's ex-husband, Lieutenant [T.], his wife, Captain Johanns, and myself.
Q Now, did you ever date the accused?
A Yes sir, I did at one time.

* * * * * *

Q Where did you go?
A We went down to the Haunted House at the Fairgrounds at Minot, at that time.

* * * * * *

Q After you went to the funhouse downtown, what did you do with the accused?
A We returned to my residence, sir.
Q Here on base?
A Yes sir.
Q That evening, did you engage in sexual intercourse?
A Yes sir.
Q Were there any other times when you had sexual intercourse with the accused?
A Yes sir.

2/ Note 2 - Continued

Note A : During all times pertinent here, the Officers' Club was closed for renovations and all officers were authorized to use the NCO Club.

Note B : Though the fact was not mentioned to the court members, at the time of the accused's trial, he was married to the woman who had been Lieutenant T's wife during the relevant time frame. It was Lieutenant T's report of the accused's sexual activity with the enlisted women that brought these matters to the attention of the command.

I am prepared to defer to the expertise and factfinding authority 3/ of the Court of Military Review in their conclusion that dating, and even sexual intercourse, between an officer and an enlisted person, without more, is not prohibited by custom in the Air Force; and so the accused would have lacked notice that that type of conduct was a crime. See Parker v. Levy, supra, 472 U.S. at 752-61, 94 S. Ct. at 2559-64. However, I am frankly astounded by the majority's implicit conclusion that there is no custom in the Air Force (the existence of which had been conceded by the defense at trial) forbidding associations between officers and enlisted personnel that (quoting the military judge) "demean the officer,"

3/ Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c).

"detract from the respect and regard for authority inherent in the military relationship between officers enlisted," "prejudic[e] ... good order and discipline in the armed forces," "dishonor[] or disgrac[e]" the officer "personally," "seriously compromise[] his standing as a commissioned officer," and are "morally unbefitting and unworthy." Unfortunately, I find no authority for this Court to overturn this remarkable, factual conclusion. Article 67(d), UCMJ, 10 U.S.C. § 867(d). Thus, while I must abide the judgment of the majority below, I wish to make it clear that my deference to their factfinding expertise in the customs of that service in no way forecloses a different result from other service courts, should the circumstances of a particular case so dictate.